

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GENERATION II, INC.,)
) Case No. C95-1842C
Plaintiff,)
) Seattle, Washington
v.)
) Jury Trial, Day Three
MEDICAL TECHNOLOGY,)
) March 30, 2005
Defendant.)
)
)
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN C. COUGHENOUR
UNITED STATES DISTRICT JUDGE

For the Plaintiff: HENRY BUNSOW, ESQ.
DUANE MATHIOWETZ, ESQ.
DAVID BILSKER, ESQ.

For the Defendant: ROY HARDIN, ESQ.
GREG HARRIS, ESQ.
MARK BACKENFEN, ESQ.

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Proceedings recorded by computer-aided stenography.

1 SEATTLE, WASHINGTON; WEDNESDAY, MARCH 30, 2005

2 9:00 A.M.

3 THE COURT: All right.

4 MR. BUNSOW: Good morning, Your Honor.

5 Generation II would call David Little by deposition at
6 this time. Mr. Bilsker will be reading the questions
7 from the deposition and Mr. Levy, a lawyer from our
8 office, will be playing the part of Mr. Little, if
9 that's acceptable with the Court.

10 THE COURT: All right.

11 (The following deposition was read into the
12 record.)

13 Q. Good morning. Would you please state your full
14 name for the record.

15 A. It's Charles David Little, III.

16 Q. Do you go by David?

17 A. Yes.

18 Q. And what is your address, sir?

19 A. 408 Ridgehaven, one word, R-I-D-G-E-H-A-V-E-N,
20 Place in Richardson, Texas 75080.

21 Q. And at some point you came to work at Bledsoe; is
22 that correct?

23 A. Bledsoe, I started there in November of '95.

24 Q. And what was your position when you came to
25 Bledsoe?

1 A. Director of marketing -- of sales and marketing.

2 Q. Is that still your position?

3 A. Yes.

4 Q. Is it your responsibility on behalf of the
5 company to keep the sales force advised of new
6 developments and products at Bledsoe?

7 A. Yes.

8 Q. Is Bledsoe Thruster for treatment of patients
9 following high tibial osteotomies?

10 A. Yes.

11 Q. Do you know what percentage of its sales relate
12 to braces used for treatment of HTO?

13 A. I do not know a specific percentage, no.

14 Q. But it's clearly a market that Bledsoe wants to
15 sell to?

16 A. Yes.

17 Q. Thank you.

18 THE COURT: All right.

19 MR. MATHIOWETZ: Plaintiffs call to the
20 stand John Hansen.

21 JOHN HANSEN, being duly sworn, testified as
22 follows:

23 THE CLERK: State your full name and spell
24 your last name.

25 THE WITNESS: John Lauren Hansen,

1 H-A-N-S-E-N.

2 DIRECT EXAMINATION

3 BY MR. MATHIOWETZ:

4 Q. Good morning, Mr. Hanson.

5 A. Good morning.

6 Q. By whom are you employed?

7 A. I'm employed by a company called Navigant
8 Consulting.

9 Q. And what is your position at Navigant?

10 A. I'm a director at Navigant and I work out of the
11 San Francisco office.

12 Q. Can you generally describe Navigant and the
13 nature of work undertaken by your company.

14 A. Sure. Navigant is an international consulting
15 firm. We have approximately 150 consultants and over 35
16 offices. And Navigant provides accounting and economic
17 litigation related consulting both in the context of
18 general business consulting and in dispute situations
19 such as this.

20 Q. What are your duties and responsibilities as a
21 director at Navigant?

22 A. As a director at Navigant, I consult for clients
23 in a variety of industries, that includes both
24 litigation related work such as here today and
25 nonlitigation related work. And that would include

1 damage analysis and quantification. As a director at
2 Navigant, I'm also one of the leaders of our national
3 intellectual property practice.

4 Q. Is it also part of your duties to serve as expert
5 witnesses in cases such as this?

6 A. Occasionally that happens, yes.

7 Q. Let's talk briefly about your education and
8 employment history. Would you please tell the Court and
9 the jury your educational background.

10 A. Yes. I graduated from Santa Clara University in
11 1989 with a degree in finance. I also studied economics
12 and accounting.

13 Q. Have you taken any courses since graduating from
14 Santa Clara University?

15 A. I have. I've taken a couple of classes. I took
16 an intensive advanced accounting course at Texas A&M.
17 And also took some accounting related classes at
18 University of California, Berkeley.

19 Q. Following college, what was your first
20 employment?

21 A. After college, I went to work for a company
22 called Peterson Consulting in San Francisco. Peterson
23 was a national consulting firm with about 500
24 consultants in 26 offices. Peterson provides consulting
25 very similar to the nature of the work we do here at

1 Navigant.

2 Q. You did similar work at Peterson as you're doing
3 now?

4 A. It evolved over time, but very similar.

5 Q. And how long were you employed at Peterson?

6 A. I worked at Peterson Consulting for five years.

7 Q. When did you leave Peterson Consulting?

8 A. I left Peterson Consulting in the summer of 1994
9 to join a company called Tucker Allen.

10 Q. And what was the business of Tucker Allen?

11 A. Tucker Allen was a business and litigation
12 consulting firm. So, again, in the same industry as
13 Navigant. And, in my role there, I provided expert
14 witness testimony and consulting and analysis related to
15 accounting, economic and damages issues.

16 Q. And how long did you stay with Tucker Allen?

17 A. I was at Tucker Allen for almost ten years.

18 Q. And when did you leave Tucker Allen?

19 A. Tucker Allen was acquired by Navigant last
20 February. So, up until last February, is when I joined
21 Navigant.

22 Q. Mr. Hansen, during the course of your career,
23 have you had any area of emphasis?

24 A. Yes, I have.

25 Q. And what are those?

1 A. Most of my work has involved the analysis of
2 damages. That includes both identifying the appropriate
3 measure of damages as well as the quantification of
4 damages. Over the last 10 to 12 years, I've had a
5 particular focus on intellectual property matters.

6 Q. Have you previously been involved in patent
7 infringement disputes?

8 A. Yes, numerous times.

9 Q. Do you have any idea of approximately how many
10 matters you've been involved in?

11 A. Well, I don't maintain any list or account, but
12 it would be in excess of 50 separate matters.

13 Q. Could you briefly describe your experience in
14 this area?

15 A. Sure. Generally, in these cases, our first task
16 is to determine what is the appropriate measure of
17 damages, and then to quantify those damages. And that's
18 been really across a wide variety of industries ranging
19 from athletic shoes to digital film for cameras to water
20 purification systems, a lot of work with computer
21 hardware and software as examples.

22 Q. Have you had experience with various types of
23 damages which are available in patent cases?

24 A. Yes, I have.

25 Q. Have you had reason to review contracts and

1 licenses and determine reasonable royalty rates?

2 A. Yes. In most of the intellectual property cases,
3 one of the issues is the issue of what a reasonable
4 royalty would be. And so, in most of the patent
5 infringement matters I've been involved with, an aspect
6 of that has been to determine a reasonable royalty rate.
7 And, in connection with that, I've reviewed and analyzed
8 hundreds of separate contracts.

9 Q. Have you testified as an expert witness prior to
10 today?

11 A. Yes. I have testified in deposition, arbitration
12 and in trials.

13 Q. Do you have an estimate of the number of times
14 that you've been an expert witness?

15 A. I've testified approximately 15 times.

16 Q. And, when you've testified as an expert,
17 generally what topics have you testified to?

18 A. The topics have included damages, economic
19 damages, so the identification of the proper measure of
20 damages, and then the quantification or calculation of
21 those damages.

22 Q. Have you lectured or given seminars in your area
23 of expertise?

24 A. Yes, I have provided lectures and seminars
25 related to accounting, economics and damages and

1 valuation type issues.

2 Q. Can you give us some examples of those lectures
3 and presentations.

4 A. Sure. I've presented to the bar association in
5 San Francisco, the intellectual property section, on
6 patent damages. I was a guest lecturer at the
7 University of California, Hastings College of the Law on
8 patent damages. And a couple of years ago was presenter
9 at the national meeting for a group called the Licensing
10 Executive Society. And that's a group of 5,000
11 professionals involved in the industry of licensing
12 intellectual property.

13 Q. Let's turn our attention to your work in this
14 matter. What were you asked to do in this litigation?

15 A. I was asked to analyze and determine Generation
16 II's damages attributing to Bledsoe's infringement of
17 the patents-in-suit. And, in connection with that, I
18 have assumed that the patents-in-suit are valid and that
19 they are infringed by Bledsoe.

20 Q. What types of information have you reviewed and
21 relied on in determining Generation II's damages?

22 A. Our study last involved a variety of different
23 sources of information. That would include financial
24 documents and information from Generation II, so
25 financial statements. Additionally, financial

1 information from Bledsoe, listings of the sales of the
2 accused products, as well as units and sales dollars. I
3 also reviewed Bledsoe financial statements. There are
4 various license agreements that have been provided in
5 the matter that I've reviewed. Also looked at and
6 analyzed documents related to the market and market
7 share percentages for the various market participants.
8 I had discussions with Generation II personnel, and also
9 reviewed deposition testimony.

10 Q. Who did you have discussions with at Generation
11 II U.S.A. and Generation II Orthotics?

12 A. For Generation II Orthotics, I had discussions
13 with Dean Taylor and Lance Taylor. For Generation II
14 U.S.A. I had discussions with a gentleman named Al
15 Young, and then some folks from their accounting
16 department as well as their selling and marketing group.

17 Q. Before we proceed, Mr. Hansen, have you prepared
18 a series of charts to assist us today in communicating
19 your opinions to the jury?

20 A. Yes, I have.

21 Q. Have you prepared a chart that presents
22 conceptually your approach to determining damages?

23 A. Yes.

24 Q. If you look in your exhibit book at Exhibit 318,
25 please, would you just briefly describe this and tell us

1 whether you have prepared this or have had it prepared
2 on your behalf for this case.

3 A. Yes. Exhibit 318 is a summary of my overall
4 approach to calculating damages in this case, and this
5 was prepared at my direction.

6 MR. BUNSOW: Your Honor, we'd move for
7 admission of plaintiff's Exhibit 318.

8 MR. HARRIS: I have no objection to 318,
9 Your Honor.

10 THE COURT: It will be admitted.

11 (Exhibit Admitted.)

12 BY MR. MATHIOWETZ:

13 Q. Looking at this chart, would you tell us the
14 approach that you've taken.

15 A. Certainly. There are two available remedies, two
16 available measures of damages in a patent infringement
17 matter. The first is lost profits; so, if the
18 infringing sales caused Generation II to lose the sale
19 of a brace, that would be lost profits.

20 The second measure is a reasonable royalty. And
21 the patent holder is entitled to no less than a
22 reasonable royalty for all the infringing sales of the
23 defendant. So, to walk you through this chart, I've
24 broken up Bledsoe sales into both domestic sales and
25 international sales, domestic sales being sales in the

1 United States. For Bledsoe sales in the United States,
2 I have split the award, so I have split or segregated
3 the damages between lost profits and reasonable
4 royalties. So, for a portion of Bledsoe's infringing
5 sales, I'm claiming that Generation II would have made
6 sales but for the infringement. The remainder are
7 subject to availability. So this would go down into the
8 orange circle, the royalty bucket. For Bledsoe's
9 international sales, all of those braces were
10 manufactured in the United States, and so they would be
11 subject to U.S. patent laws, is my understanding, and
12 therefore one royalty bearing. So all of the -- all of
13 Bledsoe International sales I've included in the royalty
14 calculation.

15 Q. Mr. Hansen, have you prepared a chart which
16 summarized Generation II's damages in this case?

17 A. Yes.

18 Q. If you would turn to Exhibit 319 in your
19 notebook, is that chart a summary of your damages
20 testimony?

21 A. Yes. This is a summary of the damages that I've
22 calculated.

23 MR. BUNSOW: Your Honor, we'd offer
24 plaintiff's Exhibit 319 into evidence.

25 MR. HARRIS: Your Honor, we object, and I

1 would like to have a side bar on this.

2 THE COURT: All right.

3 (Side bar conference, out of the presence of
4 the jury.)

5 MR. HARRIS: Your Honor, this opinion, as
6 he's expressing to the public, contains reliance by this
7 witness on information that was the subject of our
8 motion in limine. In response to our motion in limine,
9 plaintiff said that they would call Al Young as a
10 witness. He's -- Al Young potentially could identify
11 the factual basis on which this opinion is based, but he
12 hasn't been called as a witness, contrary to what they
13 said. They said they could contact and talk to Mr. Dean
14 Taylor about these subjects so that they could verify
15 and validate that. The problem, Your Honor, is that the
16 opinions are based on a particular document, trial
17 Exhibit No. 70, which allocates market share. No one
18 can verify that this document is anything other than
19 numbers on a page. This witness in deposition could not
20 tell where he got this from or whether it was accurate,
21 and in his testimony in deposition said that this
22 document and these market allocations would have to be
23 provided by a Gen II witness. That has not been done,
24 there is no basis for his opinion. And, under Daubert,
25 he shouldn't be allowed to give it.

1 THE COURT: The objection is overruled.

2 (Side Bar Concluded, Jury Present.)

3 MR. MATHIOWETZ: Your Honor, we renew our
4 request to enter Exhibit 319 into evidence.

5 THE COURT: It will be admitted.

6 (Exhibit Admitted.)

7 BY MR. MATHIOWETZ:

8 Q. Mr. Hansen, if you could look at Exhibit 319 and
9 explain the damages summary that you've prepared.

10 A. Yes. This summary is broken up into the two
11 damages elements that I just described. On the top is
12 lost profits, that includes both loss of profits for
13 Generation II U.S.A. and Generation II Orthotics, which
14 total \$2,130,000 approximately. The royalties are on
15 the bottom half of the sheet. And, as I mentioned
16 before, there were royalty components for both domestic
17 and international sales, and the royalties total
18 \$1,260,000 approximately. Resulting in total damages of
19 \$3,386,145.

20 Q. We're going to get into more detail about lost
21 profits and your calculation of those, but what are lost
22 profits?

23 A. What one has to do in this situation is determine
24 what would have happened but for the infringement. So,
25 if we take Bledsoe out of the market, would Generation

1 II have made additional sales. And there's a case that
2 sets forth some factors that one can consider, it's
3 referred to as the Panduit decision. And that provides
4 guidance for someone like myself what types of factors I
5 should look to to determine and help answer the question
6 would Generation II have made additional sales.

7 Q. You mentioned the Panduit factors. What are
8 those factors?

9 A. There were four factors set forth in the Panduit
10 opinion. The first one is their demand for the patented
11 invention and the patented products. The second factor
12 is are there acceptable noninfringing substitutes that
13 were available in the market. The third factor is did
14 the patent holder or Generation II have the capacity to
15 make the additional claimed sales. And the fourth
16 Panduit factor is just whether or not you can reasonably
17 calculate the lost profits.

18 Q. John, if you could just pull your microphone a
19 bit closer. Thank you.

20 Did you determine that there was demand for the
21 patented invention?

22 A. Yes, I did.

23 Q. What was your basis for determining that there
24 was a demand for the patented invention in this case?

25 A. I looked at Generation II's actual sales of

1 products which incorporate the patented invention. And,
2 from 1995 through the middle of 2003, Generation II
3 U.S.A. sold over 110,000 units of product, which
4 incorporated the patented invention for over \$657
5 million. I also looked at the testimony of Mr. Little
6 from Bledsoe, and he indicated that the adjustability
7 feature was significant. It was important to customers.
8 And it was also a significant factor in the marketing
9 and sales of knee braces. And that was confirmed also
10 by Generation II's own marketing literature which touted
11 the patented invention.

12 Q. The second Panduit factor you mentioned was the
13 absence of acceptable noninfringing alternatives. What
14 you do you mean by acceptable noninfringing
15 alternatives?

16 A. An acceptable non-infringing alternative would be
17 a product that provides the benefits of patented
18 inventions without infringing on the patent.

19 Q. And how does the presence of acceptable
20 noninfringing alternatives impact your calculation?

21 A. Again, we're trying to determine how many sales
22 Generation II would have made but for the infringement.
23 To the extent that there are other products that are
24 available in the market that are acceptable substitutes,
25 those products may have made sales in place of Bledsoe.

1 So, to the extent there are acceptable noninfringing
2 substitutes, one could consider that and the impact that
3 those companies could make for sales instead of
4 Generation II.

5 Q. To the extent that sales would not have been made
6 by Generation II, is there still a measure of damages
7 for the other sales?

8 A. Yes, there is. The Thruster brace would still be
9 utilizing generation II's patents, and therefore would
10 have to pay a royalty on those sales.

11 Q. The third Panduit factor you mentioned deals with
12 manufacturing and marketing capability to meet the
13 demand. With respect to manufacturing capability, do
14 you have an opinion whether Generation II U.S.A. and
15 Generation II Orthotics had the manufacturing capacity
16 to make the additional sales that you are claiming?

17 A. Yes, I believe they did.

18 Q. And what's the basis for your opinion?

19 A. With respect to Generation II U.S.A. and
20 Generation II Orthotics, I had discussions with Dean
21 Taylor and Al Young. They described the manufacturing
22 facility to me and described as well the additional
23 capacity that was present in those plants, which I
24 understand to be 30 percent, meaning that Generation II
25 U.S.A. could increase production by 30 percent and then

1 in addition they could add a second shift if necessary.
2 I then took the claimed additional sales and compared
3 that to Generation II's actual sales and determined that
4 that would result in an approximately 11 percent
5 increase in units, which I found would be less than the
6 30 percent, and therefore Generation II U.S.A. had the
7 capacity.

8 Q. Now, with respect to marketing and selling
9 capability, did Generation II U.S.A. and Generation II
10 Orthotics have the additional capacity for the sales?

11 A. Yes, they did.

12 Q. And what's the basis of that opinion?

13 A. Generation II was a pioneer in the industry.
14 They were one of the market leaders. And, at the time
15 of the damages period, they had a well-established
16 national distribution and selling network in place.

17 Q. The last Panduit factor that you mentioned was
18 the amount of profits plaintiff would have made. Would
19 you please describe this factor.

20 A. This factor really just asks if you're able to
21 calculate the profits, and I have performed an analysis
22 of Generation II's revenue and costs that we will go
23 through, and so I have been able to do that in this
24 case.

25 Q. Now, with respect to lost profits damages,

1 looking at Exhibit 319, which is in front of us, can you
2 tell us how you calculated Generation II USA's lost
3 profits of \$1,735,335?

4 MR. HARRIS: Your Honor, might I have a
5 continuing objection to this line of questions?

6 THE COURT: Yes.

7 BY MR. MATHIOWETZ:

8 A. Certainly.

9 Q. Have you prepared a chart to help us with your
10 explanation?

11 A. I have.

12 Q. If you'd turn to Exhibit 324 in your witness
13 book, have you prepared or had this exhibit prepared on
14 your behalf to assist you today in your testimony?

15 A. Yes. This chart summarizes my calculation of
16 Generation II's U.S.A. lost profits.

17 MR. MATHIOWETZ: Your Honor, I'd move for
18 the admission of plaintiff's Exhibit 324 into evidence.

19 MR. HARRIS: Same objection.

20 THE COURT: It will be admitted.

21 (Exhibit Admitted.)

22 BY MR. MATHIOWETZ:

23 Q. Generally, Mr. Hansen, what does Exhibit 324 show
24 us.

25 A. This exhibit focuses just on Generation II U.S.A.

1 and it's a summary of my calculation of lost profits.
2 Lost profits have been calculated for the period of June
3 1995 through January of 2001. During that period, I've
4 determined that Generation II would have sold an
5 additional 6,723 braces. The revenue associated with
6 those braces would be approximately \$4 million. From
7 that, I need to deduct the cost that Generation II would
8 incur to manufacture, sell and distribute those
9 products, which is the \$2.3 million approximately, which
10 results in the \$1,753,000 lost profits figure.

11 Q. Now, you mentioned that this lost profits
12 calculation was done through January of 2001. Why did
13 you cut off lost profits at that point?

14 A. In February of 2001, Bledsoe introduced a brace
15 called the Aligner. The Aligner brace is not accused to
16 infringe Generation II's patents. Although Bledsoe
17 continued to sell the Thruster brace and subsequently
18 introduced the infringing Thruster 2 brace, I've
19 determined for purposes of my lost profits calculation
20 that in February 2001 when the Aligner was introduced,
21 I've assumed that Bledsoe could have or would have
22 switched all of their production away from the Thruster
23 braces to the Aligner brace.

24 Q. How did you determine Generation II's OA brace
25 market share?

1 A. To determine Generation II's market share, I was
2 provided with a summary, an analysis of market share by
3 Generation II U.S.A., and I took that analysis, and from
4 that I removed any braces that were not adjustable and
5 also removed the infringing Thruster braces. And then,
6 with the remaining market, I quantified Generation II's
7 market share in relation to the remaining parties.

8 Q. Why do you believe that Generation II's analysis
9 of the market share was reasonable?

10 A. I do believe it was reasonable. And it was
11 consistent with Mr. Little's testimony. Mr. Little
12 provided testimony that indicated he believed Generation
13 II was the market leader, followed by Donjoy, followed
14 by Townsend, with Bledsoe being fourth after that. That
15 was consistent with the analysis prepared by Generation
16 II U.S.A.

17 I also reviewed an industry report prepared by a
18 company called Frost and Sullivan that presented market
19 share figures. And those market share figures for 2001
20 were similar to the market share figures presented in
21 the Generation II analysis.

22 Q. And you referred to the Frost and Sullivan
23 report. Could you just briefly describe who Frost and
24 Sullivan is and why that report is of special interest.

25 A. Frost and Sullivan is an industry research group,

1 and they provide research and reporting out on various
2 industries, and one of the industries that they tracked
3 and covered was the market for OA knee bracing. And so,
4 therefore, it's an independent third party source that
5 one can use to corroborate information such as market
6 share.

7 Q. So the Frost and Sullivan report is not something
8 that's paid for by one of the manufacturers; is that
9 right?

10 A. No, it's not.

11 Q. Now, there's been some testimony and argument
12 that the market here is actually split into two parts,
13 off-the-shelf and custom braces. How do you respond to
14 that?

15 A. I wouldn't agree with that.

16 MR. HARRIS: Objection, Your Honor, lacks
17 foundation.

18 THE COURT: Overruled.

19 BY MR. MATHIOWETZ:

20 Q. And why do you believe -- why do you disagree
21 with that?

22 A. Several reasons. First, the analysis that
23 Generation II provided in their opinion that the Frost
24 and Sullivan review would be the market for OA knee
25 bracing. If we look to the Frost and Sullivan report

1 for purposes of calculating market share, Frost and
2 Sullivan includes off-the-shelf and custom braces in the
3 same market. Further, Bledsoe individuals have
4 testified that they were competitors with Generation II,
5 that Generation II was one of their primary competitors.
6 If one is your primary competitor, I find it hard to
7 believe that they would be in a different market.

8 Q. Now, you prepared a series of charts to
9 demonstrate your lost profits calculation?

10 A. Yes, I've prepared a series of three charts that
11 use the year 2000 to illustrate the calculations.

12 Q. If you would turn to your exhibit notebook to
13 plaintiff's Exhibit 321. Is this a chart that you have
14 prepared to assist in presenting your testimony here
15 today?

16 A. Yes, Exhibit 321 is a summary of my determination
17 of Generation II's market share for the year 2000.

18 MR. MATHIOWETZ: Your Honor, we'd offer
19 Exhibit 321 into evidence.

20 MR. HARRIS: Your Honor, I object to this
21 exhibit on the grounds previously stated, and also on
22 the grounds that it purports to combine Donjoy and
23 Generation II, and there's no evidence that's been
24 presented that Donjoy made an infringing device, which
25 is required.

1 THE COURT: Objection is overruled, it will
2 be admitted.

3 (Exhibit Admitted.)

4 BY MR. MATHIOWETZ:

5 Q. Referring to Exhibit 321, Mr. Hansen, would you
6 please tell us how you calculated the market share for
7 Generation II U.S.A. in the year 2000.

8 A. Yes. As I mentioned earlier, we took the market
9 share analysis provided by Generation II, and from that
10 deducted adjustable braces and the infringing Thruster
11 braces. We then calculated Generation II's market share
12 relative to the other competitors. You'll see here that
13 I've highlighted in yellow Donjoy and have in
14 parentheses infringing. A company called Donjoy that
15 you may have heard of also manufactured two braces that
16 infringed Generation II's patents or accused to infringe
17 Generation II's patents. There's some -- there's a
18 legal decision that provides guidance in this area
19 referred to as Moreflow, which basically indicates that
20 if there are third-party infringers in the market for
21 purposes of determining how many additional sales the
22 patent holder would have made, it's permissible to
23 include the sales of a third-party infringer as your
24 own. So I've taken that as an assumption, and I've
25 incorporated that in the analysis.

1 So, if we look at the chart, the impact that I've
2 claimed in the year 2000, Generation II would have made
3 48 percent of the sales that Bledsoe made of its
4 infringing products during that year.

5 Q. I've noticed that your chart does not include the
6 Bledsoe market share. Why is that?

7 A. Bledsoe's brace is what we're trying to allocate
8 to the remaining parties, so we have to remove that to
9 determine the relative pro rata market share of the
10 remaining parties in the market.

11 Q. Now, with respect to the Donjoy braces, you
12 indicated that you have included them as part of
13 Generation II's market share. Can you discuss for us in
14 some more detail why you've done that?

15 A. Sure. My understanding is that it's Generation
16 II's opinion that the Donjoy braces infringed Generation
17 II's patents. Subsequently, in 2003, Donjoy received a
18 license from Generation II for the '169 and the '806
19 patents. So they have now secured a license and are
20 licensed competitors from 2003 on.

21 Q. Turning to Exhibit 322 in your book, have you
22 prepared an exhibit to assist you today in presenting
23 your testimony with regard to the market share for
24 Generation II U.S.A. in the year 2000?

25 A. Yes. Exhibit 322 takes the market share and

1 demonstrates the next step in the process.

2 MR. MATHIOWETZ: We'd offer into evidence
3 plaintiff's Exhibit 322.

4 MR. HARRIS: Same objection.

5 THE COURT: Overruled, it will be admitted.

6 (Exhibit Admitted.)

7 BY MR. MATHIOWETZ:

8 Q. Would you explain this pie chart for us, Mr.
9 Hansen.

10 A. Yes. Again, this deals with the year 2000. The
11 box in the upper right-hand corner, you'll see the 48
12 percent that we looked at on the previous chart. The
13 2,816 units is the number of Bledsoe sales in 2000 of
14 the Thruster brace. So I multiplied 48 percent times
15 Bledsoe sales to come up with 13,527 units, and that's
16 the number of units that I've included in my lost
17 profits calculation. In the bottom left-hand corner,
18 the remainder, so 52 percent of the 2,816 units, are
19 subject to and included in the royalty calculation.

20 Q. Now, after you calculated the number of units
21 subject to lost profits, how did you determine
22 Generation II's lost profits? If you'd turn to Exhibit
23 323 in your notebook, if you could just identify that
24 for us, please.

25 A. Yes. This Exhibit 323 provides a more detailed

1 calculation of the lost profits in the year 2000.

2 Q. Is that a chart that you have prepared to assist
3 in your testimony today?

4 A. Yes, it is.

5 MR. MATHIOWETZ: Your Honor, we'd offer
6 Exhibit 323 into evidence.

7 MR. HARRIS: Same objection.

8 THE COURT: Overruled, it will be admitted.

9 (Exhibit Admitted.)

10 BY MR. MATHIOWETZ:

11 Q. Looking at this chart, would you please explain
12 how you've determined Generation II U.S.A.'s lost
13 profits for the year 2000.

14 A. Sure. In this chart, again, builds on the
15 previous two charts. The 1,352 units that we calculated
16 on the previous chart is presented in the green box at
17 the top here. I then took those units and allocated
18 those across the braces that Generation II actually sold
19 during the year 2000. So I've assumed that the
20 additional sales would have been made in the same
21 proportion that Generation II actually sold its
22 Unloader, ADJ, Select and Express brace. So I allocated
23 the units in the first row. Then I multiplied those
24 units times the actual average price that Generation II
25 received for those units during that year, and that

1 gives me the revenue. I then apply a margin rate of 45
2 percent, which I calculated based on my analysis of
3 Generation II's costs. And that will result in the
4 profit.

5 Q. Looking back at Exhibit 324, the total lost
6 profit units are 6,723; is that correct?

7 A. That's correct. That would be a summary
8 following the same methodology I just described for all
9 of the years from June '95 through January of 2001.

10 Q. Let's talk about the relevant costs. What are
11 relevant costs that you have deducted?

12 A. A relevant cost, you could also refer to it as an
13 incremental cost. That reflects the additional costs
14 that would be incurred by Generation II to manufacture
15 and sell the additional braces. So it would include
16 items like material, labor, freight, sales commission,
17 costs of that nature.

18 Q. What did you do to determine the relevant costs
19 in this case?

20 A. For my analysis of relevant costs, I received
21 very detailed financial statements from Generation II.
22 I then went through those financial statements with
23 their controller and identified the nature of all the
24 costs, what costs were captured in each category, and
25 determined whether or not those costs are costs that

1 would vary with an additional sale.

2 Q. So, again, looking at Exhibit 324, which is in
3 front of us, it's your calculation that the relevant
4 costs during the entire period for which you've
5 calculated infringement is \$2,259,246?

6 A. That's correct.

7 Q. And that results in lost profits during that
8 period of \$1,753,535?

9 A. For Generation II U.S.A.

10 Q. I'm going to refer you back to Exhibit 319. In
11 the second line, you have Generation II Orthotics. How
12 did you go about calculating the damages for Generation
13 II Orthotics?

14 A. For every lost brace sale that Generation II
15 U.S.A. incurs, Generation II Orthotics loses the sale of
16 a hinge or the receipt of a royalty related to that
17 sale. So, to the extent Generation II U.S.A. loses a
18 sale, Generation II Orthotics also loses profits.

19 Q. Now, is the same period for calculating damages
20 applicable for Generation II Orthotics as it was for
21 Generation II U.S.A.?

22 A. Yes, the time period and the units mirror those
23 used in the Generation II U.S.A. calculation.

24 Q. If you would turn to Exhibit 325 in your book,
25 can you just briefly identify this document for us and

1 tell us if you've prepared that document to assist in
2 your testimony today.

3 A. Yes. This is a document that I prepared which
4 presents a summary of my analysis of Generation II
5 Orthotics' lost profits.

6 MR. MATHIOWETZ: Your Honor, we'd move for
7 admission of Exhibit 325 into evidence.

8 MR. HARRIS: Same objection, Your Honor.

9 THE COURT: Overruled, it will be admitted.

10 (Exhibit Admitted.)

11 BY MR. MATHIOWETZ:

12 Q. Can you explain Exhibit 325 to the jury, please.

13 A. Yes. As I mentioned before, this relates to
14 Generation II Orthotics and their lost sales of hinges
15 and/or braces if the Express brace Generation II
16 Orthotics supplied a completed product to Generation II
17 U.S.A. So, depending on if the lost sale is an Unloader
18 ADJ, Select or Express, they would either lose the sale
19 of a hinge or a completed Express brace. The revenue
20 was calculated based on the revenue that Generation II
21 Orthotics would actually receive for those products.
22 From that, I again determined the costs that would be
23 incurred by Generation II Orthotics to provide the
24 additional units. I subtracted the costs from the
25 revenues, and that gives me lost profits. You'll notice

1 that I have the C dollar sign, which indicates that
2 these are in Canadian dollars. So then, on the bottom
3 row, I've taken the lost profits in Canadian dollars and
4 converted those to United States' dollars.

5 Q. With respect to the revenue, what are the
6 components to the revenue?

7 A. For Generation II U.S.A. sales of Unloader ADJ
8 and Select braces, Generation II Orthotics would have
9 supplied a hinge for \$104 Canadian, or received a
10 royalty for \$104 Canadian, and we'll discuss that a
11 little bit later in the testimony. For the Express
12 brace, it's the cost that Generation II Orthotics
13 charges Generation U.S.A. for that brace.

14 Q. So, referring back to plaintiff's Exhibit 319,
15 your total lost profits figure for Generation II U.S.A.
16 and Generation II Orthotics combined is \$2,120,266; is
17 that correct?

18 A. That's correct.

19 Q. Now, the next section or the next damages that
20 you show on your summary of damages is royalties. What
21 is a royalty?

22 A. A royalty is a payment from a licensee to a
23 patent holder for use of that invention.

24 Q. Do you, on this chart, break royalties up between
25 domestic sales and international sales?

1 A. As I mentioned before, I have split the damages
2 award between lost profits and reasonable royalties.
3 So, for the domestic sales, I split that out separately
4 so that I could determine what amounts were not included
5 in the lost profits calculation to then include in the
6 royalties determination. And, as I mentioned before,
7 Bledsoe provided an independent list of their
8 international sales, so I've added that into the
9 royalties as well.

10 Q. How did you determine the appropriate royalty
11 rate to apply in this matter?

12 A. In these situations, one conducts what's referred
13 to as a hypothetical negotiation. This is obviously a
14 license agreement that didn't happen because we're here
15 today. So what the expert needs to do is put the
16 parties back in time at the date of first infringement
17 at the negotiating table and try to determine what
18 royalty rate they would have agreed to. And, in that
19 situation, it's incumbent upon me to assume and for both
20 parties to assume that the patent-in-suit is valid and
21 infringed.

22 Q. What is the date of the hypothetical negotiation?

23 A. The date of the hypothetical is March of 1995.

24 Q. Have you prepared a chart that lists each of the
25 Georgia-Pacific factors?

1 A. Yes, I have.

2 Q. Is that Exhibit 326 in your notebook?

3 A. Yes.

4 MR. MATHIOWETZ: Your Honor, we'd move for
5 admission of Exhibit 326 into evidence.

6 MR. HARRIS: I have no objection.

7 THE COURT: It will be admitted.

8 (Exhibit Admitted.)

9 BY MR. MATHIOWETZ:

10 Q. Mr. Hansen, could you briefly describe for us the
11 Georgia-Pacific factors which are shown in Exhibit 326.

12 A. Yes. First, I should note that the
13 Georgia-Pacific is the opinion that sets forth the
14 hypothetical negotiation construct, so this is the
15 approach that's commonly used in these situations. And
16 Georgia-Pacific provided 15 separate factors for
17 consideration in determining what royalty rate would
18 have been agreed to by the parties. And, I'm not going
19 to go through and read all of these for you, but I've
20 broken them down into three major groups.

21 The first is license scope and deals. And that
22 really deals with what is the scope of the license
23 that's the subject of the hypothetical negotiation and
24 are there any license agreements or deals out there that
25 are instructive or provide guidance for what the parties

1 may have agreed to in this situation.

2 The second section I've labeled profitability and
3 business considerations. And that deals primarily with
4 issues such as what is the commercial relationship of
5 the parties, are they competitors, or is it a situation
6 where you have an inventor and parties who are going to
7 try to commercialize the invention. These factors also
8 include issues related to the profitability of the
9 infringing product.

10 The third I've labeled technical and benefits.
11 And those factors really deal with what are the benefits
12 of the patented invention. And then, overall, to
13 summarize really is what the reasonable royalty rate
14 that you've determined in this matter.

15 Q. Now, have you considered all of these
16 Georgia-Pacific factors in establishing a reasonable
17 royalty?

18 A. Yes, I did consider them all.

19 Q. Are all of the factors given the same weight?

20 A. Depending on the facts and circumstances of the
21 case, some factors may be more instructive or relevant
22 than others.

23 Q. If you would refer to Exhibit 327 in your
24 notebook, please.

25 A. Okay.

1 Q. Would you tell us if this is a chart that you
2 have prepared to assist in your testimony here today?

3 A. Yes. As I just mentioned, some of the
4 Georgia-Pacific factors are more relevant than others.
5 This chart, Exhibit 327, is a summary of what I find to
6 be the more relevant factors and considerations for
7 determination of a royalty in this matter.

8 MR. MATHIOWETZ: Your Honor, we'd move for
9 admission of Exhibit 327 into evidence.

10 MR. HARRIS: No objection.

11 THE COURT: Admitted.

12 (Exhibit Admitted.)

13 BY MR. MATHIOWETZ:

14 Q. Starting in the first bullet point, Mr. Hansen,
15 could you describe for us the consideration of
16 Generation II USAs -- Generation II USA's agreement with
17 Generation II Orthotics.

18 A. Yes. Generation II U.S.A. entered a license
19 agreement with Generation II Orthotics initially in
20 1999. That was revised effective June 1, 1995, and
21 there was a subsequent amendment to that in 2001. And,
22 under the terms of that agreement, Generation II U.S.A.
23 was granted rights to the '169 and the '806 patents.

24 Q. What was the royalty rate in the June 1995 of
25 Generation II U.S.A.'s license agreement with Generation

1 II Orthotics?

2 A. That agreement contained a royalty provision
3 which called for a royalty of \$104 Canadian for every
4 brace that is sold by Generation II U.S.A. It also
5 contained a clause which allowed them to receive a
6 credit against those royalties if they were to purchase
7 the hinge from Generation II Orthotics for \$104
8 Canadian.

9 Q. And that agreement was amended in 2001; is that
10 correct?

11 A. Yes. There was a limited amendment in 2001 that
12 related specifically to a brace called the Spirit. And
13 for Spirit braces manufactured and sold by Generation II
14 U.S.A. they were to pay Generation II Orthotics \$70
15 Canadian.

16 Q. If you would turn to Exhibit 328 in your exhibit
17 notebook, please. Is this a chart that you have
18 prepared to assist in giving your testimony here today?

19 A. Yes, it is.

20 MR. MATHIOWETZ: Your Honor, we'd move for
21 admission of Exhibit 328 into evidence.

22 MR. HARRIS: No objection.

23 THE COURT: It will be admitted.

24 (Exhibit Admitted.)

25 BY MR. MATHIOWETZ:

1 Q. Could you explain how you have calculated
2 effective royalty rates as set forth in Exhibit 328.

3 A. Sure. As I just mentioned, the license agreement
4 called for a royalty of \$104 Canadian or \$70 Canadian.
5 So what this chart does is tries to convert those
6 amounts into a percentage of revenue. So the first row
7 deals with the Generation II Unloader ADJ and Select
8 braces. The next column has the average actual selling
9 price for those braces. The royalty per unit, \$100
10 Canadian, converts to approximately \$75 U.S. If I
11 divide the \$75 by the average price per unit, that gives
12 me an effective royalty rate of between 11 and 12
13 percent.

14 The second row deals with the Spirit brace, for
15 which there was a \$70 royalty per unit. The average
16 price was \$462. I divide the \$50, which is the \$70
17 Canadian converted to U.S., by the \$4,672, that gives me
18 11 percent effective royalty rate.

19 Q. Now, you have a third entry in your chart,
20 Bledsoe Thruster. Bledsoe is not part of any license
21 agreement between Generation II U.S.A. and Generation II
22 Orthotics. Why did you calculate the effective royalty
23 rate for Bledsoe in this chart?

24 A. That's correct, Bledsoe was obviously not a party
25 to that agreement. So what I've tried to do on the

1 final row is determine if Bledsoe were required to pay
2 the same royalty rate, the same per unit royalty rate
3 that Generation II U.S.A. paid, what would that reflect
4 as far as effective royalty rate. So I've taken the \$50
5 to \$70 royalty per unit amounts, divided those by the
6 actual average price of the Thruster brace. And that
7 results in a 11 to 17 percent effective royalty rate.
8 That's what the Bledsoe royalty would be if they were
9 required to pay the same amount as Generation II U.S.A.

10 Q. This is all part of your calculation to try to
11 come up with what would be a reasonable royalty rate to
12 apply in this case; is that right?

13 A. That's correct.

14 Q. Turning back to Exhibit 327, the second bullet
15 item states, Bledsoe and Generation II U.S.A. are direct
16 competitors. What's the basis of the fact that they are
17 direct competitors?

18 A. In situations where the licensee and the licensor
19 are competitors, it can be a very significant factor in
20 that, if the patent holder is going to grant a license
21 to a competitor, it could result in lost sales. So this
22 would consider their lost sales and profits when they're
23 negotiating the royalty.

24 Q. Moving on to the next point, what do you mean by
25 Generation II U.S.A. incremental profits are 42 percent

1 to 45 percent?

2 A. For every sale that Generation II makes, they
3 earn incremental profits of 42 to 45 percent. So, to
4 the extent they license a company like Bledsoe and lose
5 a sale, they lose a 45 percent margin on that sale.

6 In addition, as I've discussed, Generation II
7 Orthotics would also incur lost profits. That would be
8 in addition to the lost margin for Generation II U.S.A.

9 Q. Is it fair to assume that the higher the
10 incremental profits for the lost sale, the higher
11 reasonable royalty that would be appropriate?

12 A. That's fair.

13 Q. Next, on Exhibit 327, you indicate that Bledsoe
14 profits for infringing products are 22.5 percent higher.
15 Can you explain for us what you mean by that. And, if
16 you would turn to Exhibit 329 in your notebook, please.

17 A. Sure.

18 Q. Is this a chart that you've prepared to assist in
19 your testimony here today?

20 A. Yes. This is my analysis of comparison of
21 Bledsoe's profits.

22 MR. MATHIOWETZ: Your Honor, we'd move for
23 the admission of Exhibit 329 into evidence.

24 MR. HARRIS: Object to this, Your Honor.
25 It's the document I've never seen before other than in

1 this context of this trial. It's never been presented
2 as part of his report.

3 THE COURT: Is that correct, counsel?

4 MR. MATHIOWETZ: Actually, it is referred to
5 in one of his exhibits to his deposition testimony and
6 in his -- which is his report.

7 THE COURT: Was it contained as -- was the
8 exact document contained as an exhibit in that
9 deposition?

10 MR. MATHIOWETZ: The exact document was not,
11 but clearly all of the content of the document was set
12 forth in his report.

13 THE COURT: Objection sustained.

14 BY MR. MATHIOWETZ:

15 Q. Could you just describe for us how you had
16 determined that the Bledsoe profits on the infringing
17 products are 22 and a half percent greater than they are
18 for its noninfringing products.

19 A. Certainly. And this again can be a primary
20 factor impacting what amount the licensee would be
21 willing to or able to pay.

22 Bledsoe had provided some information which
23 documented their direct costs, labor and material that
24 would be incurred in the production of every Thruster
25 brace. They also provided us, as mentioned, audited

1 financial statements. Those audited financial
2 statements contained a breakdown of the cost of goods
3 sold, which separately broke out material and labor.
4 Mr. Day, who was Bledsoe's controller, testified that
5 the \$44 direct cost per Bledsoe's Thruster brace was
6 calculated on the same basis as the information in
7 Bledsoe's audited financial statements. So, using those
8 two points, I was able to determine that, for the
9 Thruster brace, Bledsoe earns approximately 22 percent
10 higher margin than they do for all of their other
11 products. So, at the end of the day, if they make \$100
12 in sales, they would end up with \$22 of additional
13 profit on the Thruster brace versus the other products
14 that they sell.

15 Q. What's the significance of the fact that Bledsoe
16 makes \$22 and a half percent more profit on its
17 infringing products than on its noninfringing products?

18 A. It's an indication that Bledsoe could pay up to a
19 22 and a half percent royalty on the Thruster brace and
20 still be left with profits that are equivalent to what
21 they earn on the rest of their business.

22 Q. Now referring back to Exhibit 327, the next entry
23 there is Dr. Noyes's agreement, indicates that Bledsoe
24 can pay a 15 percent royalty. Can you describe that for
25 us, please.

1 A. Yes. And I know there has been some testimony
2 about the agreement with Dr. Noyes. Bledsoe entered an
3 agreement with Dr. Noyes related to testing and
4 evaluation, publication of some test results, and some
5 assistance with advertising and promotional materials
6 for the Thruster knee brace. And, under that agreement,
7 Bledsoe was to pay Dr. Noyes 15 percent of the revenue
8 that it receives for the sale of the Thruster brace.

9 Q. Did Dr. Noyes's agreement include any patent?

10 A. No, it did not.

11 Q. Then why is it relevant to the hypothetical
12 negotiation?

13 A. The agreement with Dr. Noyes is from June of
14 1995, so that's just three months after the date of the
15 hypothetical negotiation in this case. And that
16 indicates to me that Bledsoe was able to and willing to
17 pay a 15 percent royalty rate and still be left with
18 profits that it felt were adequate.

19 Q. Finally, the last royalty rate consideration set
20 forth in Exhibit 327 is DJ Orthopedics Limited license
21 to the '169 and '806 patents for \$4 million. Can you
22 explain that, please.

23 A. Sure. As I mentioned earlier, DJ Orthopedics,
24 which we've also referred to as Donjoy, entered a
25 license agreement with Generation II in May of 2003.

1 And, under that license agreement, Donjoy was granted
2 rights to the '169 and the '806 patents, the patents at
3 issue in this case. And, for that license, Donjoy paid
4 Generation II \$4 million. That was a lump sum license
5 fee. You will notice in my bullet point I used the term
6 limited, and that's because Donjoy was only granted
7 limited use rights to those patents. In this situation
8 under the hypothetical negotiation, Bledsoe's rights
9 would not be limited in any fashion, so that would
10 arguably be worth more. So the limitation would put
11 downward pressure on the license rate.

12 Q. Mr. Hansen, are you aware that Bledsoe has
13 licensed patents for some of its products?

14 A. Yes, I'm aware of at least three license
15 agreements that Bledsoe entered into where they paid
16 royalties for patent use rights.

17 Q. And how do those agreements effect your analysis?

18 A. Those agreements provide a benchmark for a
19 metric. Under those agreements, Mr. Bledsoe paid 7
20 percent on a couple of the agreements, one of them had a
21 sliding royalty scale. One of the agreements was as low
22 as 3 percent, which had a clause which allowed the
23 royalty rate to be reduced to 2 percent under certain
24 circumstances. So those are the rates that Bledsoe had
25 agreed to for other products.

1 Q. Taking all of these considerations into account,
2 what reasonable royalty rate do you believe is
3 appropriate in this case?

4 A. Based on my analysis and of the Georgia-Pacific
5 factors, I believe a 10 percent royalty rate would be
6 reasonable in this circumstance.

7 Q. And you've taken that 10 percent royalty rate and
8 calculated the total royalty damages which are due; is
9 that correct?

10 A. That's correct.

11 Q. If you would look at Exhibit 330 in your notebook
12 and tell us if this is a summary of your royalty
13 calculations.

14 A. Yes. This is a summary of my calculation of
15 domestic royalties.

16 MR. MATHIOWETZ: Your Honor, we'd move for
17 admission of Exhibit 330 into evidence.

18 MR. HARRIS: No objection.

19 THE COURT: Admitted.

20 (Exhibit Admitted.)

21 BY MR. MATHIOWETZ:

22 Q. Would you explain your calculations for us, Mr.
23 Hansen?

24 A. I will. And it's a little bit of a detailed
25 chart.

1 The first column just indicates the time period
2 that we're looking at.

3 The second column is a summary of Bledsoe's
4 domestic sales revenue for the Thruster and Thruster 2
5 braces by time period. You'll recall that we, for a
6 portion of the sales from June of '95 through January
7 2001, I claimed lost profits.

8 The third column reflects the market share that I
9 have assigned to other manufactures, so I make an
10 adjustment for that.

11 And the fourth column titled Revenue reflects the
12 total domestic sales revenue of Bledsoe after I remove
13 the revenue that I've included in my lost profits
14 calculation. So, the fourth column, the \$9.4 million
15 approximately is the amount that's subject to reasonable
16 royalty.

17 And, the final column, I just applied the 10
18 percent royalty, and come up with total royalty of
19 939,026.

20 Q. Those are for domestic sales; is that correct?

21 A. That's correct. That's for the domestic portion.

22 Q. Now, turning back again to Exhibit 319, you've
23 also shown royalties for international sales. Could you
24 just briefly describe your calculation.

25 A. Yes. Bledsoe, as I mentioned, provided separate

1 summaries of their international sales. All of the
2 Thruster braces are manufactured in the United States
3 and would therefore be subject to United States' patent
4 law and would be subject to the hypothetical license
5 agreement. Bledsoe had total International sales of
6 \$3,268,528. I apply the 10 percent royalty rate to that
7 figure. And that results in the total damages of
8 \$326,853.

9 Q. If you'd just turn in your exhibit notebook to
10 Exhibit 331, is that chart a summary of your calculation
11 of international royalties?

12 A. Yes. Exhibit 331 is my calculation of the
13 royalties for international sales.

14 MR. MATHIOWETZ: Your Honor, I'd move for
15 admission of Exhibit 331 into evidence.

16 MR. HARRIS: No objection.

17 THE COURT: Admitted.

18 (Exhibit Admitted.)

19 BY MR. MATHIOWETZ:

20 Q. Now referring back to plaintiff's Exhibit 319,
21 having discussed or having analyzed all of these
22 factors, what is your opinion with regard to the damages
23 that have been incurred by Generation II U.S.A. and
24 Generation II Orthotics in this matter?

25 A. I believe we've gone through all of the elements

1 of the damages on this chart, both the lost profits and
2 the reasonable royalties. And, in my opinion, the total
3 damages that Generation II incurred is \$3,386,145.

4 MR. MATHIOWETZ: Thank you, Mr. Hansen. No
5 further questions.

6 THE COURT: All right, Mr. Harris.

7 MR. HARRIS: Thank you, Your Honor.

8 CROSS EXAMINATION

9 BY MR. HARRIS:

10 Q. Good morning, Mr. Hansen.

11 A. Good morning.

12 MR. HARRIS: Your Honor, may I approach the
13 witness, please?

14 THE COURT: Yes.

15 BY MR. HARRIS:

16 Q. Mr. Hansen, I've put before you your deposition,
17 it was taken twice in two different sessions, on October
18 24th and on November 20th; is that correct?

19 A. That's correct.

20 Q. As to your experience -- I'm sorry. You assumed
21 that the patent is valid and that it is infringed; is
22 that correct?

23 A. That's correct, that's an assumption.

24 Q. So, if the jury finds contrary to that,
25 everything you've talked about here to the jury may be

1 interesting but it is relevant?

2 A. Assuming it is invalid, there are no damages.

3 Q. Are you an accountant?

4 A. I believe I refer to myself as an accountant.

5 Q. Are you a CPA?

6 A. At the current time, no.

7 Q. You've been involved with three trials; is that
8 correct?

9 A. Yes.

10 Q. One was a maritime personal injury; is that
11 correct?

12 A. That's correct.

13 Q. One was with a breach of contract; is that
14 correct?

15 A. That was an arbitration.

16 Q. I'm sorry. Have you been involved in a trial and
17 two arbitrations?

18 A. It's been two arbitrations and three trials.

19 Q. Okay. Have you been involved in a patent trial?

20 A. Yes, I have.

21 Q. As a witness in court?

22 A. Yes.

23 Q. Was that after your deposition was taken?

24 A. I believe both patent trials would be after my
25 deposition.

1 Q. So, at the time of your deposition in October of
2 2003, you had not been involved in any patent trials; is
3 that correct?

4 A. I had not testified in trial on a patent case,
5 that's correct.

6 Q. And you were involved in two arbitrations, a
7 breach of contract and a maritime case; is that right?

8 A. That's correct.

9 Q. Have you ever participated in a patent
10 negotiation, a license negotiation?

11 A. I have supported license negotiations on numerous
12 occasions. I don't believe I've actually sat in the
13 negotiating session. That's generally been left to the
14 lawyers and the business owners.

15 Q. Would you refer to your deposition, please, this
16 is taken 10/24/2003, page 8 line 8.

17 A. Okay.

18 Q. Question, have you participated in any way in
19 negotiations -- by that, I mean you were in the
20 negotiation session -- in connection with any patent
21 license negotiation? Answer, I don't believe so. Is
22 that what you said at that time?

23 A. Yes. And the that's what I just said, I haven't
24 participated in the actual negotiating session.

25 Q. You've been involved in one instance of

1 negotiations before negotiations actually began, as
2 contrasted with commenting on negotiating positions; is
3 that correct?

4 A. I believe I said that I'm not always privy to the
5 on-going negotiations and whether or not there have been
6 negotiations. So my consulting commonly involves
7 assisting counsel with evaluating settlement positions,
8 potential royalty rates, strategy setting, and that may
9 or may not have been before any initial negotiations.

10 Q. The slides that you've presented here today were
11 not included in your report; were they?

12 A. That's correct.

13 Q. Your report was quite a bit more detailed and has
14 a lot more figures than those charts; don't they?

15 A. There were some detailed calculations, correct.

16 Q. As a matter of fact, you've made three reports in
17 this case concerning damages; is that correct?

18 A. I've authored two reports and participated in a
19 third.

20 Q. The first report was issued by Mr. Meyer of
21 Tucker Allen; is that correct?

22 A. That's correct.

23 Q. That was in 1998; correct?

24 A. That's correct.

25 Q. And it contains a different methodology of

1 calculating damages than that which you've told the jury
2 here today; is that correct?

3 A. There was some different claim elements and
4 approaches that were contained in the 1998 report.

5 Q. In the 1998 report, Generation II claimed lost
6 profits for every single sale that Bledsoe had made; is
7 that correct?

8 A. That's correct.

9 Q. There was a second report issued in 2002 which
10 you did author; is that correct?

11 A. Yes.

12 Q. And Generation II in that report claimed lost
13 profits for every single sale; is that correct?

14 A. There were two lost profits calculations
15 presented in the 2002 report. One was based on the
16 assumption that Generation II would make every sale that
17 Bledsoe had made, the second calculation was based on
18 the market share approach.

19 Q. And, when you made those reports, you thought
20 that that was a reasonable calculation; didn't you?

21 A. I believed it was.

22 Q. Based upon what people from Generation II told
23 you, you thought that they would capture all of the
24 Thruster sales; is that right?

25 A. That was based upon what I knew from Generation

1 II as well as the testimony of Bledsoe individuals.

2 Q. If you'd followed that same methodology in
3 calculating your lost profits here, do you have any idea
4 what the profits would have been that Generation II
5 would be seeking from this jury?

6 A. Haven't done that calculation.

7 Q. The modification to change to the methodology
8 that you've presented here didn't occur until August of
9 2003; is that correct?

10 A. I'm not certain I follow that question.

11 Q. You didn't change the methodology of calculating
12 damages to simply an allocated portion of the market
13 until you issued your report on August 4th of 2003; is
14 that correct?

15 A. I don't believe that's correct.

16 Q. You had both measures in the year 2002 report.

17 A. I believe so.

18 Q. But you didn't fix on the measure that you've
19 told this jury is the proper measure until 2003, August
20 of 2003; is that correct?

21 A. I wouldn't agree with that. In the 2002 report,
22 I presented both measures of damages.

23 Q. Which meant that you were still thinking that the
24 overall complete capture of profits was a proper
25 measure; wasn't that your opinion at that time?

1 A. That that was a measure that potentially would be
2 appropriate.

3 Q. That it was a proper measure, or you wouldn't
4 have included it in your report; is that correct, Mr.
5 Hansen?

6 A. That's correct, given the underlying facts and
7 circumstances.

8 Q. So this suit had been pending for eight years
9 before this analysis of damages was presented; is that
10 right?

11 A. If you mean before the report that I authored in
12 its final form, I did author that in 2003, that's
13 correct.

14 Q. And so it was eight years before the
15 presentation -- the slides and everything weren't in
16 your report, were ever presented to Bledsoe; is that
17 correct?

18 A. The 2003 report reflects the production of
19 additional material over time and the evolution of the
20 case.

21 Q. Were there other changes that you made between
22 those reports?

23 A. Between the 2002 and 2003 --

24 Q. Between the 1998 report, which is only three
25 years after the lawsuit was filed, and the 2003 report,

1 which was eight years after the lawsuit was filed.

2 A. There were some other changes.

3 Q. And what other changes did you make in the
4 methodology so that you could more accurately reflect
5 the damages, in your opinion?

6 A. Well, there would be a couple of changes in
7 methodology during that time period. There was a claim
8 element that was dropped. And, as I indicated in my
9 testimony, I cut off the lost profit damages in February
10 of 2001. Those would probably be the major approach
11 changes.

12 Q. What claim element was dropped?

13 A. In the 1998 report, if I recall, there was a
14 claim that was put forth assuming that Generation II
15 would have sold the Express brace earlier than it
16 actually did.

17 Q. And that was dropped out of the 2003 report?

18 A. That was dropped out of I believe the 2002
19 report, the first report that I authored.

20 Q. What was the other major change you made?

21 A. I believe the other major change I mentioned was
22 stopping the lost profits calculation after the
23 introduction of the Aligner brace.

24 Q. And that was based upon a date that was given to
25 you by Mr. Mathiowetz; is that right?

1 A. That was based upon the date at which the Aligner
2 brace was actually introduced.

3 Q. Are you familiar with the Grain Processing case?

4 A. Yes, I am.

5 Q. And do you use it in your analysis of patent
6 damages?

7 A. The Grain Processing case, depending on the facts
8 and circumstances, may be relevant to a case, certainly.

9 Q. The Grain Processing case holds -- and correct me
10 if I'm wrong -- that if a person who is an alleged
11 infringer has a noninfringer alternative that would be
12 available to him, even though it was not actually in the
13 market, lost profits won't flow against that person; is
14 that correct?

15 A. That's generally correct. That, if they had an
16 alternative that was known, knowable, could have been
17 built, produced and manufactured, that that could impact
18 the person's ability to -- the plaintiff's ability -- to
19 claim lost profits after the date at which that product
20 could have been introduced.

21 Q. And you were simply told what that date would be
22 by Mr. Mathiowetz; is that right?

23 A. As I mentioned, I used the date that the Aligner
24 brace was actually introduced.

25 Q. You didn't inquire or analyze whether it could

1 have been introduced at an earlier date; is that
2 correct?

3 A. That's correct, I haven't done any independent
4 analysis in that regard.

5 Q. Now, isn't it a matter of fact that you have done
6 no market analysis?

7 A. I wouldn't agree with that.

8 Q. Have you got factual information that you
9 yourself know as a fact concerning the allocation of
10 market share in the adjustable brace/knee brace
11 business/OA business during the period 1994 through
12 2001?

13 A. I do have and have utilized in my calculations
14 Generation II's actual sales. And, as I indicated
15 earlier, I also reviewed and corroborated the market
16 share percentages in a general nature with testimony.
17 And also reviewed the Frost and Sullivan industry report
18 for 2001.

19 Q. You say you've reviewed the Frost and Sullivan
20 report of 2001; correct?

21 A. That's correct.

22 Q. At the time of your deposition in 2003, had you
23 reviewed the Frost and Sullivan report?

24 A. No, I had not been provided with that.

25 Q. So the opinions that you have expressed here are

1 opinions that you had reached in 2003; is that correct?

2 A. That's correct.

3 Q. And so -- and the opinion that you reached in
4 your report in 2003 contained market allocation
5 information; is that right?

6 A. It did through 2001.

7 Q. So you didn't rely on the Frost and Sullivan
8 report in preparing your report in anyway because you
9 didn't read it until after you'd done the report; is
10 that correct?

11 A. That's correct. The Frost and Sullivan report
12 confirmed the reliability and reasonableness of the
13 market share calculation.

14 MR. HARRIS: I move to strike everything
15 after that's correct, Your Honor.

16 THE COURT: Overruled.

17 BY MR. HARRIS:

18 Q. You were provided with a document from Generation
19 II which purported to allocate market share, and you
20 used that document as your basis of allocation; is that
21 correct?

22 A. I was provided with a document from Generation
23 II, that's correct.

24 Q. Let me show you exhibit -- the first page of
25 Exhibit 106. And, since we're going to do it this way,

1 why don't you thumb all the way through the exhibit,
2 because I think that you will recognizes this.

3 A. Is there a copy that I can thumb through?

4 MR. HARRIS: This is one of plaintiff's
5 exhibits, Your Honor. I move the admission of 106.

6 MR. MATHIOWETZ: No objection.

7 THE COURT: Admitted.

8 (Exhibit Admitted.)

9 BY MR. HARRIS:

10 Q. Do you recognizes Exhibit 106?

11 A. Yes, I do.

12 Q. And this is a document that was given to you by
13 Generation II?

14 A. That's correct.

15 Q. And you don't know who produced it; is that
16 correct?

17 A. I understand that it was provided by Generation
18 II including --

19 Q. But you don't know who the person was; is that
20 right?

21 A. I believe it was prepared by Al Young and Dean
22 Taylor and other people involved in the selling and
23 marketing aspects of Generation II's business.

24 Q. Are you aware that the testimony of Mr. Young is
25 that this was prepared by a man named Reg Olsen?

1 A. Yes. And Reg Olsen as well. And I should also
2 add a person named Ron Massero for the later periods.

3 Q. You did not for this period because Mr. Massero
4 didn't work there during this period. This covers 1992
5 through 1997; is that right?

6 A. That's correct.

7 Q. And you received this document from people at
8 Generation II; correct?

9 A. Yes.

10 Q. Did you ever do anything to verify its accuracy
11 during the time that you were doing your work?

12 A. Yes. As I mentioned, I had discussions with Al
13 Young, Dean Taylor and also reviewed deposition
14 testimony from Bledsoe individuals related to who the
15 competitors were and the general ranking of competitors
16 and their market shares.

17 Q. Let's look at the second page of Exhibit 106.
18 And that would be the information that was provided to
19 you by Generation II in 1995; is that correct?

20 A. The second page relates to the year 1995.

21 Q. Is it your understanding that this information
22 was collected to be an estimate of the number of units
23 that were sold for everyone except Generation II?

24 A. I think that's a fair characterization.

25 Q. Was it your understanding that the percentages

1 then were assigned based upon these estimates of units
2 sold?

3 A. Could you repeat the question, please.

4 Q. Was it your understanding that the percentages of
5 market that were assigned to the parties were based upon
6 the estimates of units sold?

7 A. I believe that this chart reflects Generation
8 II's best understanding as to what the relative sales
9 would be for the parties. So, for a party that may have
10 been -- they had a belief as to a certain number of
11 units that were sold, and other competitors, they may
12 have had a belief that they were equivalent to that, or
13 half that, or something of that nature. So, in a
14 general sense, I would agree with that.

15 Q. Okay. And, in this document, on the page 2, it
16 shows that Bledsoe sold 2,000 units in 2005 -- excuse me
17 -- in, 1995; is that correct?

18 A. That's correct.

19 Q. Now, you had access to all of Bledsoe's sales
20 records; is that right?

21 A. Yes.

22 Q. You would have been able to go to those records
23 and verify whether that number that was assigned by
24 whoever did this report, who we haven't heard from,
25 whether that was a right number or a wrong number;

1 correct?

2 A. Yes.

3 Q. Did you do that?

4 A. Yes, I did.

5 Q. And what did you determine Bledsoe's actual sales
6 were in 1995?

7 A. I don't recall the exact number.

8 Q. Isn't it included in the materials that you
9 included in your report?

10 A. Yes.

11 Q. What page would that be on?

12 A. I believe that would be either attachment 4 or 5
13 of the 2003 report.

14 MR. HARRIS: Your Honor, if I could have the
15 Exhibit 335B. 335B. It's plaintiff's exhibit, so I
16 would move the admission of 335B.

17 MR. MATHIOWETZ: No objection.

18 THE COURT: It will be admitted.

19 (Exhibit Admitted.)

20 BY MR. HARRIS:

21 Q. Second page. Is this the document you're
22 referring to?

23 A. That is, although that reflects the adjustment,
24 the update, just prior to trial.

25 Q. I understand. But, as to the 1995 Bledsoe sales,

1 it's the very first number on the left-hand column of
2 numbers; is that correct?

3 A. That would be for the period June through
4 December 1995.

5 Q. And that was when Bledsoe sold the units, began
6 selling in June?

7 A. They began selling in March.

8 Q. Was there some reason you didn't include sales
9 before June?

10 A. We started the calculation June 1st. That was
11 the effective date of the 1995 license agreement between
12 Generation II U.S.A. and Generation II Orthotics.

13 Q. So do you understand that there were sales that
14 occurred between -- before June of 1995?

15 A. Yes, there were.

16 Q. Do you know the amount of those sales?

17 A. Yes.

18 Q. Is there some other document you can go to?

19 A. I have in front of me attachment 5 to my 2003
20 report.

21 Q. Yes.

22 A. And, looking at the first row sales from the
23 introduction of the Thruster through December 1995 --

24 Q. Yes.

25 A. -- total 1,790.

1 Q. So the Exhibit No. 106 showed 2,000 units in that
2 period of time, and the facts showed 1,796; right?

3 A. 1,790, correct.

4 Q. 1,790.

5 Let's go back to Exhibit 106 again, please. In
6 the year 1996, what does it show Bledsoe's sales were?

7 A. Exhibit 106 shows Bledsoe sales as 3,437 units.

8 Q. Going back to Exhibit 335B, what do you show as
9 the actual?

10 A. 2,407 units.

11 Q. That's a difference of about 50 percent based
12 upon the number of actual sales that you're showing on
13 this time line Exhibit 106, 50 percent more sales than
14 actually occurred; is that correct?

15 A. Using the 2,400 number as the basis, that would
16 be correct.

17 Q. The 2,400 unit number is the basis because that's
18 all they sold; right?

19 A. That's what they sold. I was just clarifying
20 that that's as a percentage of the 2,400 as opposed to
21 as a percentage of the 3,400 difference.

22 Q. As opposed to the percentage of the number that's
23 just a number, an estimate; right?

24 A. I was just trying to clarify.

25 Q. Look at the third page of Exhibit No. 106,

1 please.

2 A. The fourth page.

3 Q. Fourth page, I'm sorry. That's in 1997; is that
4 right?

5 A. Yes.

6 Q. What does that show as Bledsoe sales?

7 A. 4,889 units.

8 Q. And, if you go to Exhibit No. 335B and get the
9 actual number, what's that?

10 A. 3,030.

11 Q. That's a difference of better than 50 percent;
12 correct?

13 A. That would be a little bit more than 50 percent,
14 that's correct.

15 THE COURT: We'll take 15 minutes at this
16 time.

17 (Proceedings in Recess.)

18 BY MR. HARRIS:

19 Q. Mr. Hansen, I was asking you about -- I asked
20 you, I believe before the break, about any testing that
21 you did as of the date that that's in Exhibit 106, and I
22 think you indicated you talked to some people; is that
23 right?

24 A. That's right.

25 Q. Who did you talk to?

1 A. I discussed the market share percentages with Al
2 Young and also Dean Taylor.

3 Q. Did you do anything else to do any testing of the
4 accuracy of the data in Exhibit 106?

5 A. As I mentioned, I compared the data in 106 to
6 actual sales to confirm that those numbers matched, and
7 also reviewed testimony of Mr. Bledsoe.

8 Q. But you didn't do anything to compare it to
9 Bledsoe's actual sales; correct?

10 A. No, I did compares those numbers to Bledsoe's
11 actual sales.

12 MR. HARRIS: Could I have Exhibit 106A on
13 the screen. I'm sorry, this is plaintiff's exhibit, I'd
14 move its admission.

15 MR. MATHIOWETZ: No objection.

16 THE COURT: Admitted.

17 (Exhibit Admitted.)

18 BY MR. HARRIS:

19 Q. Would you go to the year 2000 on this. It's the
20 third page in.

21 A. Okay.

22 Q. And this shows the estimated sales of Bledsoe to
23 be \$7,464; correct?

24 A. 7,464 units.

25 Q. Excuse me, units.

1 A. That's right.

2 Q. And, the actual, on 335B, was significantly
3 different; is that correct?

4 A. Yes, it was significantly lower than that number.

5 Q. Almost -- the number that was used in the market
6 allocation was almost three times the number that was
7 shown in the Exhibit 335B; is that right?

8 A. Approximately.

9 Q. Would you show me 335B, please. Second page.
10 The actual sales were \$2,400? Excuse me, \$2,816
11 for 2000?

12 A. Yes. 2,816.

13 Q. Instead of the \$7,484 that's shown in the
14 information that you used to do your market allocation;
15 is that correct?

16 A. As opposed to what was included for Bledsoe that
17 was the basis for my market share allocation.

18 Q. Did you have any reason to believe that all of
19 the other numbers that were in that market allocation
20 were any more accurate than the numbers that were
21 assigned to Bledsoe which were off by a factor of three?

22 A. I believe that the overall ranking of the
23 competitors was consistent, was consistently described
24 by Bledsoe and Generation II.

25 Q. You based your opinions on the veracity of the

1 information that is contained in Exhibit 106 and 106A;
2 isn't that correct?

3 A. I assumed that they were accurate for the
4 intended purpose.

5 Q. And you don't have any facts that would support
6 the accuracy of those market allocation figures in
7 Exhibit 106 or 106A; isn't that correct?

8 A. By facts, am I not supposed to include testimony
9 in that, or the Frost and Sullivan report?

10 Q. At the time that you were deposed, you expected
11 that someone from Generation II would come in and say
12 that those numbers were accurate; didn't you?

13 A. I believe that Generation II believes that these
14 numbers were reliable, yes.

15 Q. The time of your deposition, sir, you thought
16 someone was going to come into this courtroom and tell
17 this jury that these numbers were accurate to support
18 your analysis; isn't that correct?

19 A. I understood that someone from Generation II
20 would present these.

21 Q. And that would be the factual support for the
22 conclusions that you made; is that correct?

23 A. That would be the presentation of the creation of
24 these.

25 Q. And what you've done is you've manipulated these

1 numbers assuming them to be true; is that right?

2 A. For purposes of my market share analysis, I have
3 accepted this analysis as reliable for the intended
4 purpose of determining what number of sales Generation
5 II would have made but for Bledsoe's infringement.

6 Q. And you don't know the exact support or basis for
7 all of the numbers that are contained in that schedule;
8 is that correct?

9 A. That's correct.

10 Q. Let's back up a little bit. The entire effort
11 that you're trying to undergo in your market analysis
12 and in your lost profits analysis is to determine what
13 units would have been sold by Generation II? By that, I
14 mean Generation II Canada and U.S.A. that were sold by
15 Bledsoe; is that correct?

16 A. That's a fair statement, yes.

17 Q. And, in order to do that, you have to understand
18 what the relevant market is; is that right?

19 A. I agree with that.

20 Q. You determined that the relevant market is all of
21 these braces, whether they're adjustable or not;
22 correct?

23 A. I have included just adjustable braces in this
24 market.

25 Q. I'm sorry, you've included whether they are

1 custom braces or off-the-shelf braces. I misspoke.

2 A. Yes. My market includes both custom and
3 off-the-shelf braces.

4 Q. Did you look at what the market was for
5 unadjustable braces?

6 A. I didn't analyze unadjustable braces.

7 Q. What is your understanding of Gen II's Unloader
8 ADJ, how it works? And, in that regard, is the user
9 able to adjust the angle?

10 A. My understanding is the user is not able to
11 adjust the angle, but a trained clinician or orthotist
12 would be able to adjust that in his office.

13 Q. How about for all of the other off-the-shelf
14 braces, can the user adjust those braces?

15 A. I wouldn't know specifically for each brace,
16 although I understand that they have some adjustability
17 mechanism.

18 Q. Is it usable or accessible to the user, do you
19 know?

20 A. I wouldn't know specifically for each brace.

21 Q. How about for the Donjoy, let me show Exhibit No.
22 106, second page. The Smith and Nephew Donjoy, where
23 they sold 5,000 units, do you know whether that's
24 adjustable by the user?

25 A. By the patient, I don't know.

1 Q. I assume that the patient is the user?

2 A. Yes.

3 Q. Isn't that important to know, when we're talking
4 about a market where people can actually go and get this
5 and use it themselves? As contrasted with having to go
6 to the doctor to get it adjusted?

7 A. I don't think that would be a significant factor.

8 Q. How about price, is that a significant factor in
9 determining market?

10 A. Price can be an issue for certain customers,
11 that's correct.

12 Q. If you'd look down this list that's shown on
13 Exhibit 106, do you see any difference in price between
14 the custom braces and the off-the-shelf braces?

15 A. The braces have different prices, just generally
16 speaking.

17 Q. You don't think there's a notable difference in
18 price between the off-the-shelf and the custom braces?

19 A. I would note that several of the custom braces
20 have a similar price to Bledsoe's off-the-shelf brace.
21 For example, the Smith and Nephew Donjoy Monarch, which
22 is a custom brace, is \$500, and the Thruster is \$500.
23 The Omni Align is a custom brace that's \$550, so not
24 significantly different than the price of the
25 off-the-shelf brace.

1 Q. Let's go to the fourth page of the Exhibit 106,
2 please. Now, we've got more competitors in the market
3 in 1997; right?

4 A. Yes, we do.

5 Q. And the off-the-shelf braces on average, and you
6 can probably do this in your head, on average are \$10
7 plus less than the custom braces; correct?

8 A. I haven't done that calculation.

9 Q. Can you do it in your head, or close to it?

10 A. That would be a rough approximation.

11 Q. And that doesn't indicate to you that those are
12 competitive markets if they have different prices like
13 that?

14 A. It would depend.

15 Q. No one needs a custom brace unless a doctor tells
16 them they need it; is that right?

17 A. I believe it's up to the orthopedic surgeon, the
18 doctor, or the orthotist to determine and prescribe a
19 brace for a patient.

20 Q. So, if a person needs a custom brace, that is
21 going to be prescribed by the orthotist, and it will not
22 be a Bledsoe brace; that correct?

23 A. For the individuals that would require a custom
24 brace, that's correct, they would not receive a Bledsoe
25 brace. So, therefore, those would not be included in

1 the sales that Bledsoe's actually made.

2 Q. Is it your understanding that a doctor might
3 prescribe a custom brace for someone who didn't need a
4 custom brace?

5 A. I understand that doctors may prescribe braces
6 based on a lot of different factors, and that certainly
7 a custom brace may provide a better fit, form and
8 function for the patient. So there certainly are
9 situations where the patient could receive either a
10 custom or an off-the-shelf brace, and a custom brace is
11 prescribed.

12 Q. But a patient would need a custom brace and get
13 prescribed a Bledsoe brace; is that correct.

14 A. I think that there is a subset of patients for
15 which a custom brace would be required, and I would
16 assume that they've gotten a custom brace.

17 Q. What was the year that that Generation II first
18 introduced an off-the-shelf brace?

19 A. In 1997.

20 Q. So, for the years '95 and '96, a person would
21 either be prescribed a custom brace or could use an
22 off-the-shelf brace; right?

23 A. Are you referring specifically to whose sales?

24 Q. A person would be prescribed a custom brace if
25 they needed a custom brace?

1 A. In '95 and '96?

2 Q. Yes.

3 A. That's correct.

4 Q. So there's no way that Bledsoe could be
5 displacing any of the sales that would otherwise go to
6 Gen II in those years?

7 A. That's correct. And, in those sales, the
8 customers who actually received a custom brace are not
9 included in the Bledsoe sales base. So the sales that
10 I'm looking at that I'm trying to allocate and determine
11 what portion of those sales would have gone to
12 Generation II, those are customers who actually received
13 an off-the-shelf brace, they didn't receive a custom
14 brace.

15 Q. I understand. And the reason they didn't receive
16 a custom brace is because they didn't need one. And
17 that was therefore they would not have been prescribed a
18 custom brace, and therefore Generation II didn't lose
19 those sales in 1995 and 1996; correct?

20 A. I wouldn't agree with that.

21 Q. This is a doctor's decision; correct?

22 A. That's correct.

23 Q. He looks at the patient and says you need a
24 custom brace or you can use an off-the-shelf brace;
25 correct?

1 A. I don't believe they make a determination in that
2 fashion. They make a determination as to what brace
3 would work and be efficacious for the treatment of that
4 patient. If we remove the Bledsoe brace from the
5 market, some of those folks would have been prescribed,
6 I think it's very reasonable, a Generation II brace.

7 Q. In 1995 and 1996, when other off-the-shelf braces
8 were available?

9 A. That's correct.

10 Q. Including the Donjoy brace?

11 A. Yes.

12 Q. What's the basis for your making an assumption
13 that somehow somebody who didn't need a custom brace
14 would be prescribed a custom brace in '95 and '96?

15 A. My understanding is that the brace, the braces,
16 are prescribed based on fit and function. To the extent
17 that a patient could have received a Bledsoe brace, if
18 that's off the market, off-the-shelf brace from another
19 manufacturer, may not have been suitable for that
20 person.

21 Q. But, if they did receive a Bledsoe brace, they
22 didn't need a custom brace because the orthotist decided
23 they didn't need it; right?

24 A. I would say that the orthotist decided that the
25 Bledsoe brace was appropriate for that patient and did

1 not make a determination that a custom brace would not
2 be appropriate for that person.

3 Q. Is this patient at all influenced by insurance?

4 A. Insurance, reimbursement rates may have an
5 impact.

6 Q. And that is the insurance companies want to pay
7 as little as possible?

8 A. I think the insurance companies want to minimize
9 their costs, yet prescribing a brace or a plan for a
10 brace that works and delays surgeries and those major
11 expenses, that would have been a consideration for them
12 as well.

13 Q. They'd defer that to the doctor then; is that
14 correct?

15 A. I believe they would defer that to the doctor.

16 Q. So what impact does insurance and insurance
17 reimbursements have?

18 A. For certain patients, they may be subject to
19 limitations in coverage; and, for those patients, I
20 believe cost would be a factor that they would consider.

21 Q. Do you have any understanding of what the
22 relative amounts of reimbursement are between a custom
23 brace and an off-the-shelf brace?

24 A. Generally.

25 Q. What are those reimbursement rates that you

1 understand?

2 A. And this is from my recollection, but that the
3 off-the-shelf brace, the reimbursement would range
4 generally from 700 to \$800, and the reimbursement for a
5 custom brace would be more. Anywhere in the
6 neighborhood of \$1,100 or \$1,200.

7 Q. 1,100 to 1,400, I think is that what you said in
8 your deposition?

9 A. I don't remember specifically, but that sounds
10 reasonable.

11 Q. So that an orthotist, by prescribing a custom
12 brace, could make more money; right?

13 A. There would be that potentiality.

14 Q. So there's nothing that would dissuade an
15 orthotist if he was presented with a Bledsoe brace and a
16 custom ADJ brace, his financial incentive is to
17 prescribe the ADJ; right?

18 A. I think it would vary from orthotist to
19 orthotist.

20 Q. His financial incentive would vary from orthotist
21 to orthotist?

22 A. The actual profits that the orthotist earns on
23 the distribution and sale of each of these braces would
24 vary.

25 Q. You got the information on competitors from Mr.

1 Mathiowetz, this information in 105 and 106A?

2 A. The documents were -- I don't recall exactly who
3 provided them to me. They may have come through
4 counsel. But I understood they were prepared by
5 Generation II.

6 Q. Your deposition on page 43, line 4 --

7 A. October 24th?

8 Q. I'm sorry, yes, October 24.

9 A. I'm sorry, page 43.

10 Q. Yeah. I think we paginated it all the way
11 through.

12 A. Okay.

13 Q. Line 4, question, The document says OA
14 competition competitors January 1998 to June 2003, which
15 is the Exhibit 106A, I would have to look at the
16 specific document, where did you get it is the question.
17 That would have been provided by counsel. Was that the
18 answer you gave?

19 A. Yes.

20 Q. You met with people at Generation II. Did you
21 meet with them physically, personally?

22 A. I met with people from Generation II Orthotics.

23 Q. That would be Mr. Taylor, Dean and Lance?

24 A. That's correct.

25 Q. And when was that meeting?

1 A. I don't recall a specific date, but that's before
2 the report was filed in 1998.

3 Q. Since that time, did you meet with anybody at
4 Generation II up to the time of your deposition?

5 A. Not in person.

6 Q. You had phone conversations with people from
7 Generation II; is that correct?

8 A. That's correct.

9 Q. And did you take any notes of those
10 conversations?

11 A. I had taken notes of various conversations.

12 Q. Isn't it a fact that all the notes that you took
13 of conversations that you had consisted of four pages?

14 A. That's correct.

15 Q. And that three of those pages happened on October
16 22nd and October 23rd of 2003; is that correct?

17 A. For the conversations that I had notes of, that's
18 correct.

19 Q. Isn't it your practice to keep notes of
20 conversations over a ten year period of engagement?

21 A. It would depend.

22 Q. Sometimes you would, sometimes you wouldn't?

23 A. Yes.

24 Q. And you had one page of notes which you testified
25 originally in your depositions was made in 2002; is that

1 correct?

2 A. That's correct. It related to a conversation in
3 2002.

4 Q. And I asked you three times when those notes were
5 made, and you insisted each time that it was in 2002; is
6 that correct?

7 A. My response was that I believed that they were
8 from 2002.

9 Q. And it wasn't until I pointed out to you that
10 that note had information that was only available in the
11 summer of 2003 that you realized and recanted that
12 testimony; is that correct?

13 A. When we pointed that information out, I did
14 realize and acknowledge that those notes were not notes
15 that I had taken contemporaneously in 2002 and that
16 those would have been written at a later date.

17 Q. So, more than a year later, you recalled a
18 conversation that you had a year before and wrote notes
19 about it and put it in your file; is that correct?

20 A. Before I filed my report in 2003, I received
21 updated market share information. And, in connection
22 with taking the updated information, comparing it to the
23 information I had in 2002, I wrote notes related to my
24 understanding related to 2002. I don't recall if I
25 still had my 2002 notes, original notes, but the notes

1 that I wrote before my report in 2003 reflect the
2 substance of that conversation, and I added a notation
3 to basically explain the calculation of what was
4 happening in the 2003 updated information.

5 Q. Just so I'm following you, you wrote in 2002
6 notes of a conversation you had -- excuse me -- you
7 wrote notes in 2003, notes of a conversation you had in
8 2003, and put it in your file?

9 A. It was a summary of a conversation in 2002.

10 Q. That was a conversation you had with a Mr.
11 Massero; is that right?

12 A. That's correct.

13 Q. And that's a name we haven't heard in these
14 proceedings. Who is Mr. Massero?

15 A. Mr. Massero is a Generation II U.S.A. employee.

16 Q. And he was the guy who gave you the documents
17 which are in Exhibit 106A; is that correct?

18 A. Again, I wasn't provided with these directly from
19 Mr. Massero, but I understood that Mr. Massero
20 participated in the creation of this, along with
21 assistance from Al Young.

22 Q. I'd like to refer to your deposition, page 76, on
23 line 8, Which documents are those then that he prepared,
24 he refers to Mr. Massero. Answer, Those would be market
25 share summaries for the period '98, '99, 2000, 2001,

1 2002, and an update for 2003 January through June. Did
2 these become part of your report? The answer is yes.
3 So these are the documents that we've been talking
4 about?

5 A. That's correct.

6 Q. That you got from Mr. Massero?

7 A. That Mr. Massero prepared.

8 Q. Have you ever met Mr. Massero?

9 A. Not in person.

10 Q. You understand that Bledsoe is contending that
11 there is a market for custom adjustable braces and there
12 is a market for off-the-shelf adjustable braces; is that
13 your understanding?

14 A. Yes, I do understand that.

15 Q. And one of the things that they point to is a
16 statement in the 1997 annual report of Generation II
17 U.S.A. -- excuse me -- business plan of Generation II
18 U.S.A.?

19 A. Yes, business plan.

20 Q. Where Generation II states that they, during
21 1997, intend to enter the market, enter the OTS market;
22 is that correct?

23 A. In that market share report or business plan,
24 they use the term custom market and off-the-shelf
25 market. However, on numerous occasions throughout that

1 document, they refer to the market as the OA brace
2 market on a combined basis. So they've used that term
3 market somewhat loosely in that document.

4 Q. And, prior to 1997, they did not have a product
5 in the OTS market; correct?

6 A. Prior to 1997, they did not offer an
7 off-the-shelf product for sale.

8 Q. And, to your knowledge, there has been no finding
9 of infringement by any Donjoy products on the '169 or
10 '806 patents; correct?

11 A. I don't believe there's been a judicial
12 proceeding to find --

13 Q. You've reviewed the agreement between Donjoy and
14 Gen II; right?

15 A. Yes.

16 Q. And, in that agreement, the parties agree that
17 Donjoy is -- in making that agreement, not admitting
18 infringement or admitting that the patent was valid,
19 patents are valid; is that correct?

20 A. That's correct. Fairly standard language is
21 included in there.

22 Q. So the issue of whether Donjoy is an infringing
23 product has not been determined; correct?

24 A. My understanding is that it is an infringing
25 product, they took a license to the patents, they were

1 willing to pay \$4 million for that license. I
2 understood that the Generation II individuals as well as
3 the expert with respect to technical issues reviewed the
4 Donjoy product and believed that it infringes the
5 patents and sued.

6 Q. Donjoy was being sued by Generation II at the
7 time that agreement was entered into; correct?

8 A. Yes, they had been sued for infringement for '169
9 and '806 patents.

10 Q. And there was no judgment entered in that case?
11 It was settled without a finding of infringement;
12 correct?

13 A. There was no judicial resolution.

14 Q. So the parties were left with their contentions,
15 Gen II contends that the Donjoy product infringes, but
16 there's been no determination that it does; correct?

17 A. No legal determination, that's correct.

18 MR. HARRIS: May I approach the witness,
19 Your Honor?

20 THE COURT: Yes.

21 MR. HARRIS: I've put before the witness
22 Exhibit 335 -- A188. Exhibit A188, which is a
23 demonstrative exhibit, being offered by the defendant.
24 And I offer it at this time.

25 MR. BUNSOW: That's not on our exhibit list.

1 MR. HARRIS : It was a recently prepared
2 exhibit, Your Honor, in response to his report.

3 MR. BUNSOW: May I see a copy of it?

4 MR. HARRIS: I gave it to you, it's on the
5 desk right there.

6 MR. BUNSOW: This appears to be some altered
7 chart, I'm not sure what it is.

8 THE COURT: Was it in the pretrial order?

9 MR. HARRIS: It was not in the pretrial
10 order.

11 THE COURT: The objection is sustained.

12 MR. HARRIS: Your Honor, might I be heard at
13 side bar?

14 THE COURT: No.

15 BY MR. HARRIS:

16 Q. Would you turn to Exhibit 335B.

17 A. Is that an exhibit I have up here?

18 Q. No, I'm sorry. It may be one of the exhibits you
19 have up there. I think it is, as a matter of fact.

20 A. I'm sorry, could you repeat the number.

21 Q. 335B, it starts with a sheet which was attachment
22 4 to your report.

23 MR. HARRIS: May I approach, Your Honor?

24 THE COURT: Yes.

25 BY MR. HARRIS:

1 Q. Do you recognizes 335B?

2 A. 335B appears to be the attachments to my expert
3 report.

4 Q. I think it's already in.

5 MR. HARRIS: 335, I think we were referring
6 to it.

7 THE COURT: It is in.

8 MR. HARRIS: Thank you.

9 BY MR. HARRIS:

10 Q. Looking at the first page of attachment 7, which
11 is about fourth or fifth page in, sixth page in, this is
12 a market allocation analysis that you did; is that
13 correct?

14 A. Yes.

15 Q. Using the information which you got from Mr.
16 Massero after 1998 and before that from somebody; right?

17 A. That's correct.

18 Q. And this document shows what are custom and what
19 are OTS braces; is that correct?

20 A. That information is provided on the summary.

21 Q. And a person could go through this document and
22 cross out all the information relating to custom braces,
23 and you could from this document calculate the number of
24 OTS braces that were sold and the percentage of the OTS
25 market by itself of each of the participants that are

1 listed; is that correct?

2 A. That could be done.

3 Q. And, from that information, you could take and
4 determine the percentage of the market, the OTS market,
5 that Generation II had achieved in any particular year;
6 is that correct?

7 A. If you wanted to break the market into two
8 separate markets, you could do that calculation.

9 Q. That would be the effect of doing that
10 calculation, would be to treat the OTS market as a
11 separate market; correct?

12 A. That's correct.

13 Q. And that would -- so, in this instance, you could
14 eliminate all the information except the information on
15 those last two in 1995, the two OTS competitors;
16 correct?

17 A. You're asking me if you eliminate all of the
18 custom braces?

19 Q. Yes.

20 A. Yes. You would be left with the ones designated
21 OTS.

22 Q. Your understanding is that's an accurate
23 designation so that would give you the entire OTS market
24 in as far as Generation II understood it in 1995;
25 correct?

1 A. That's correct.

2 Q. And you could do that, you could allocate then 50
3 percent to each of those players, zero percent to
4 Generation II; correct?

5 A. If you wanted to look at it on that basis, you
6 could do that.

7 Q. I'm just trying to determine the information
8 that's here would be sufficient to allow you to do that
9 calculation; correct?

10 A. Yes, you could.

11 Q. And, once you had done that, let's take a year
12 that's a little bit more -- go down to 1997, which is
13 lower down on the page, it's a little more interesting
14 because there are more OTS people. But you could
15 eliminate, for example -- you could just highlight
16 those, and you could total the number of units each of
17 those players had, and determine the percentage of the
18 OTS market that each of those people had; correct?

19 A. You could perform that calculation, that's
20 correct.

21 Q. Once you had done that, you could determine the
22 percentage of the market that Generation II had;
23 correct?

24 A. If you wanted to break the market into OTS and
25 custom, you could do that.

1 Q. Don't you understand that that's what Bledsoe
2 thinks is appropriate?

3 A. I understand that.

4 Q. So, if you wanted to do what Bledsoe thinks was
5 appropriate, you would break the market up into those
6 two halves; correct?

7 A. You could break it up in that fashion.

8 Q. And, if you did that, you could then go to
9 another sheet that's in your document here, that would
10 be page No. 3, and you could, for each of the years here
11 shown, that shows the Bledsoe units, go to the third
12 page of Exhibit 335, it shows the Bledsoe, it shows the
13 Bledsoe units right there, and it shows the percentages,
14 and you could derive the percentage that Generation II
15 had in each year of that market and put it in this
16 column right here; right?

17 A. In the second column, you could.

18 Q. In the second column. You could put the
19 percentages in that second column; right?

20 A. You could do that calculation, that's correct.

21 Q. Just based on the information that's in your
22 report; right?

23 A. Yes.

24 Q. And, if you multiply that percentage times the
25 Bledsoe units, would you get the percentage -- you'd get

1 the number of units sold in the OTS market that
2 Generation II would have sold in the OTS market using
3 your market allocation assumptions; correct?

4 A. Assuming that's a separate market, one could do
5 that.

6 Q. And, once you did that, you could come up with
7 the total number of units during the period, come up
8 with that total number of units of 6,723 units that
9 you've got. Now, would it be something -- more likely
10 be some other number if you just did the OTS market;
11 correct?

12 A. That's correct.

13 Q. Could you then do the rest of the analysis and
14 calculate the lost profits in exactly the same way you
15 did it using that number; is that right?

16 A. There would be some adjustments to the allocation
17 of the Generation II sales assuming that you are taking
18 the position that only OTS braces would have been sold.

19 Q. That's the position that Bledsoe is taking --

20 THE COURT: Mr. Harris, we've been through
21 that.

22 MR. HARRIS: Got it.

23 BY MR. HARRIS:

24 Q. But there is nothing that isn't contained in
25 these portions of your report, Exhibit 335B? You

1 wouldn't have to go anywhere else to do that
2 calculation; is that correct?

3 A. That's correct. There would be some adjustments,
4 but the basis would be in the schedules.

5 Q. One of the adjustments would be that, for any
6 units that you didn't claim lost profits, you would have
7 a royalty claim; is that correct?

8 A. That's one of the adjustments.

9 Q. What other adjustments?

10 A. When allocating the sales amongst Generation II's
11 would have been sales, you would eliminate the custom
12 braces if you're just focusing on the off-the-shelf
13 market for purposes of pricing out Generation II's lost
14 profits. And that would also impact or effect
15 Generation II Orthotics' lost profits.

16 Q. It would be a matter of doing the math, though;
17 isn't that correct?

18 A. You would change the calculations and formulas;
19 that is correct.

20 Q. You would not change the methodology in a single
21 way; is that correct?

22 A. Well, generally, I would agree with that. It's
23 definitional.

24 Q. What do you understand to be the feature of the
25 patented device that would be the subject of the

1 reasonable royalty negotiation?

2 A. The reasonable royalty would grant rights to the
3 '169 and '806 patents, and it would be unrestricted use
4 of those for any and all features or functionality
5 that's embodied in those patents.

6 Q. In order to do the proper reasonable royalty
7 negotiation, don't you have to identify what feature it
8 is that the customers want?

9 A. You would determine was what being licensed,
10 that's correct.

11 Q. And what it was about was what being licensed
12 that made it more valuable in the market; right?

13 A. I would agree with that.

14 Q. Now, when Generation II added the adjustment
15 element to the Unloader, it increased the price of the
16 Unloader; correct?

17 A. There was a price increase from the Unloader to
18 the Unloader ADJ.

19 Q. Show me Exhibit 106, please, and look at the
20 fourth page. Second page. This is the custom
21 nonadjustable, this is the custom adjustable. The price
22 went up by what, \$39?

23 A. \$36.

24 Q. \$36. Is that the value of the adjustment
25 feature?

1 A. I don't believe that that would necessarily
2 represent or reflect the value of the adjustment
3 feature.

4 Q. Isn't that an analysis of what Generation II
5 thought it was at that time?

6 A. No. That's a change in price.

7 Q. Doesn't price reflect perceived value by the
8 customer.

9 THE COURT: Mr. Harris, we're beyond the
10 scope of direct.

11 MR. HARRIS: Sorry.

12 BY MR. HARRIS:

13 Q. Reasonable royalty negotiations are hypothetical
14 negotiations; right?

15 A. That's correct.

16 Q. And those hypothetical negotiations occur before
17 Bledsoe entered the market; correct?

18 A. They take place on the date of the first
19 infringement assuming that a patent has been issued.

20 Q. In this instance, you started it when Bledsoe
21 entered the market; was that correct?

22 A. I started in March of 1995, which coincides with
23 the date at which Bledsoe began commercial sales of the
24 Thruster, and is also the date of one of the
25 patents-in-suit issuing.

1 Q. Does infringement actually begin on the date of
2 first manufacture of a patented device?

3 A. My understanding is that the manufacture of a
4 product, if that product is accused to infringe in that
5 form, could also constitute infringement.

6 Q. But you chose to use March?

7 A. Assuming a patent was issued, it could constitute
8 infringement. So, yes, I did use March.

9 Q. But it could have been earlier; right?

10 A. To the extent that there were infringing
11 activities before March, one could argue that that date
12 would be moved earlier.

13 Q. Well, they manufactured the product for purposes
14 of sale before March, because they showed it in March;
15 correct?

16 A. That's correct. Although, you would have to have
17 an issued patent to have infringement.

18 Q. Part of the negotiations is that the person is
19 not already in the market at the time that they have
20 entered into these negotiations; correct?

21 A. That they --

22 Q. If they're not already in the market?

23 A. It's the date of first infringement. So, whether
24 that's manufacture or first sale, it would be before
25 they made their initial sales of the product.

1 Q. At that time, they have a choice to make, they
2 can either going into the market and expose themself to
3 infringement damages, or they can choose not to because
4 it was going to cost them a lot to get into the market;
5 is that correct?

6 A. That's something that they could consider.
7 Although, in certain circumstances, companies will have
8 already expended a significant amount of moneys, time
9 and effort before the date of the first infringement,
10 and those would be a consideration.

11 Q. Now, you indicated, I believe, that it's the
12 demand for the patented attribute and not the demand for
13 the product that you look at in doing this negotiation;
14 correct?

15 A. That's correct. The Panduit decision itself
16 actually states demand for the patented product,
17 although I generally interpret that to mean demand for
18 the invention.

19 Q. The invention. And the invention here you
20 understood was what?

21 A. I understood that it was a joint to be used in an
22 OA knee brace that was easily adjustable.

23 Q. Now, you're aware of the Aligner as a
24 non-infringing alternative; correct?

25 A. That's correct.

1 Q. And, if the Aligner was available as a
2 noninfringing alternative, do you know what the
3 differences were between the Aligner and the brace that
4 Bledsoe is accused of infringing on, the Thruster?

5 A. Technically, I couldn't answer that question.

6 Q. If I told you that the testimony has been that it
7 was whether the brace had one hinge or two hinges, would
8 that be new information to you?

9 A. I don't recall specifically whether -- I know
10 there are some braces that have one hinge versus two
11 hinges.

12 Q. Do you have any opinion about how the market
13 would value the second hinge if that was the difference
14 between the accused devices and a noninfringing
15 alternative?

16 A. I haven't studied that.

17 Q. Wouldn't you have to do that in order to conduct
18 this hypothetical negotiation?

19 A. I don't believe so.

20 Q. What's the rule of thumb?

21 A. The rule of thumb is something that is referred
22 to in licensing negotiations, and the rule of thumb
23 essentially states that one could pay 25 percent of its
24 operating profit as reasonable royalty. And that's a
25 benchmark that could be calculated under that rule.

1 Q. And you determined that a calculation under the
2 rule of thumb would yield a royalty in this case of 7.5
3 percent; is that correct?

4 A. I did not apply the rule of thumb. That was not
5 one of the metrics that I chose to use or found to be
6 reliable. But you did ask me in deposition to calculate
7 that for the Thruster, and it was 7.5 percent was the
8 rate that I had calculated.

9 Q. And you indicated, I believe, that you estimated
10 Bledsoe's operating profits because you couldn't
11 calculate them; is that correct?

12 A. Again, I was in my deposition, I didn't take the
13 time to go through and perform a specific calculation,
14 so I didn't perform an estimate at that time.

15 Q. And the reason you couldn't calculate Bledsoe's
16 operating profits on the infringing or allegedly
17 infringing devices was because Bledsoe didn't maintain
18 its records in a product line basis; is that right?

19 A. Bledsoe did not maintain what's referred to as a
20 product line profit and loss statement. However, I
21 would have been able to, where I could, calculate
22 operating profits for the Thruster. That is something
23 that can be done.

24 Q. You did calculate operating profits, and came to
25 about 30 percent; is that right?

1 A. Roughly.

2 Q. And how did that 30 percent compare to the
3 operating profits of Generation II on its product, the
4 Adjustor, Unloading Adjustor?

5 A. I didn't specifically analyze or calculate
6 Generation II's operating profits.

7 Q. I thought one of the slides that you presented
8 earlier this morning indicated that Bledsoe could
9 realize a profit of 22 percent more than Generation II.

10 A. No. That slide indicated that Bledsoe earned 22
11 and a half percent higher profits on its sales of the
12 Thruster brace compared to all of the other Bledsoe
13 products. So it's a comparison of profit improvement
14 that Bledsoe realizes by selling the Thruster.

15 Q. I misunderstood, I'm sorry.

16 So you reject the application of rule of thumb of
17 the negotiations; is that right?

18 A. I think that the rule of thumb provides a metric.
19 However, it is I believe in most situations, much less
20 reliable than the actual financial information for the
21 products in suit.

22 Q. Are you familiar with a process of reconstructing
23 these negotiations by applying the rule of thumb and
24 either going up or down from the result of rule of thumb
25 based on the Georgia Pacific factors?

1 A. Someone could do an analysis like that.

2 Q. That's never been anything that's happened in
3 your experience, though; is that right?

4 A. Not that I recall. Generally, I don't subscribe
5 to the rule of thumb.

6 Q. If we're doing it at a time when Bledsoe hasn't
7 entered the market, you do believe that any costs that
8 Bledsoe would incur in entering the market would
9 influence the royalty; is that correct?

10 A. To the extent there were costs that would be
11 required to enter the market, I think those are -- it's
12 reasonable that Bledsoe would consider those costs.

13 Q. And, if those costs were high, Bledsoe would
14 offer a lower royalty; is that correct?

15 A. Well, that could be one result. I think that you
16 would need to compare the costs to enter the market
17 utilizing the patent infringement to the costs of an
18 invention that wouldn't utilize the patents. Because
19 you're always going to have costs associated with
20 entering any market.

21 Q. You indicated, I believe, that you were aware of
22 no other licenses that Generation II had issued to
23 licensees of its patented products other than the
24 license that it issued to Generation II U.S.A.?

25 A. I've reviewed the Generation II U.S.A. agreements

1 as well as an agreement with Sport Mate in Canada.

2 Q. And, unfortunately, the Sport Mate agreement
3 provide for a 2 percent royalty; correct?

4 A. That's not correct.

5 Q. The document, is there anything confusing about
6 the document itself that would prevent the jury from
7 reading and understanding it in their opinion?

8 A. As long as they're provided with the appendix
9 which specifically identifies three separate components
10 of the royalty, I think one could read that and draw
11 that conclusion. Although, there may be some math or
12 interpretation of the appendix.

13 Q. The Donjoy royalty amount was \$4 million; is that
14 correct?

15 A. That's correct.

16 Q. And that was a one-time one payment, they're
17 excused from any problems in the past, as long as they
18 want to sell the products that are listed in the future;
19 correct?

20 A. Correct. It's a lump sum paid-up royalty.

21 Q. Have you done an analysis by dividing the number
22 of Donjoy units into the \$4 million to determine what
23 percentage of royalty that works out to be?

24 A. I've generally looked at that.

25 Q. And what did you find?

1 A. Just basing the analysis on the historical Donjoy
2 sales, which was the information that Generation II
3 provided, so this would be based on Generation II's
4 belief as to how many Donjoy sales were made, that would
5 calculate out to an effective royalty rate based on the
6 historical analysis of a little bit over 15 percent.

7 Q. That was not a calculation you had done at the
8 time of your deposition when I asked you that; is that
9 correct?

10 A. That's correct.

11 Q. You never even reviewed the Donjoy agreement at
12 that time; is that correct?

13 A. That's not correct.

14 Q. Oh, you had reviewed it but not made the
15 calculation?

16 A. That's correct.

17 Q. So it's your opinion the Donjoy agreed to a 15
18 percent royalty for a limited license?

19 A. No. My opinion is they paid \$4 million for
20 limited use rights to the patents-in-suit. 15 percent
21 is in response to your question.

22 Q. That you had done a calculation to determine what
23 it would work out to be?

24 THE COURT: He's answered the question, Mr.
25 Harris.

1 MR. HARRIS: Thank you, Your Honor.

2 BY MR. HARRIS:

3 Q. You did a calculation where you said that
4 Generation II owed a \$104 royalty U.S.A. to Generation
5 II Canada on a per unit basis; right?

6 A. That's correct.

7 Q. But they could pay that royalty in essence by
8 buying a hinge from Generation II Canada; correct?

9 A. They were to receive a credit against the
10 royalties due for every hinge that they bought for \$104
11 Canadian.

12 Q. And that was how they paid it, was to buy the
13 hinges; is that correct?

14 A. That's what actually happened.

15 Q. And, when they bought the hinges, they actually
16 got a hinge; correct?

17 A. Yes.

18 Q. So that the net payment of a royalty on the hinge
19 was the difference between what the hinge cost and
20 whatever they had to pay to Generation II Canada;
21 correct?

22 A. That's correct. They avoided -- by purchasing
23 the hinge from Generation II Orthotics, they avoided the
24 additional cost of acquiring the hinge from another
25 party.

1 Q. So what they -- in fact, the net royalty payment,
2 because you look at the economics of both sides, the net
3 receipt of Generation II Orthotics was \$79; correct?

4 A. That would be about right.

5 Q. And that's Canadian; correct?

6 A. Yes.

7 Q. And so you have to reduce that down to make it
8 into U.S. dollars in order to be able to compare it to
9 the sales price of the Generation II product; correct?

10 A. You could do that. You could certainly look at
11 that two ways. As \$104 Canadian, which is what they
12 were obligated to pay for every brace that they sold,
13 irrespective of where the hinge came from, so that was
14 the royalty term. In actuality, they purchased a hinge,
15 so they received some value, and that would be a deduct
16 to the \$104, which would result in a payment of
17 approximately \$79 Canadian as a royalty.

18 Q. And, when you calculated the lost royalties, you
19 didn't adjust that payment -- let me look at your
20 exhibit here -- it's Exhibit 328 of the exhibits that
21 were handed to you by Mr. Mathiowetz. Do you have that?

22 A. Yes.

23 Q. In the middle column there, you show a royalty
24 per unit of \$75. In fact, that's \$75 Canadian; correct?

25 A. No. What's shown on this sheet is \$75 U.S. I

1 started on this schedule with \$104 Canadian, which is
2 the specific royalty term in the agreement, and
3 converted that to U.S. dollars. So this is \$75 U.S.,
4 not Canadian.

5 Q. But, for this \$75 U.S. they got a hinge, too;
6 right?

7 A. That's correct.

8 Q. So this is not the exact royalty payment. The
9 royalty payment was significantly less than that because
10 they got a hinge which had a value of \$25 Canadian;
11 correct?

12 A. You could look at it that way.

13 Q. If you look at it that way, and take -- this nets
14 out to be about \$52 U.S; correct?

15 A. It would be in the low 50s.

16 Q. Okay. And, if you take \$52 and compare it to the
17 \$625 price of the Gen II Unloader, what do you get?

18 A. One second, please.

19 (Pause in Proceedings.)

20 BY MR. HARRIS:

21 A. First, it would be \$57, not \$52.

22 Q. Okay. \$57 compared to the \$625, what percentage
23 is that royalty?

24 A. As a percentage of \$625, that would be slightly
25 above nine percent.

1 Q. Slightly above nine?

2 A. Yes.

3 Q. Thank you.

4 So that's what a related company agreed to pay?

5 A. That's the term in the Generation II U.S.A.

6 Generation II Orthotics agreement.

7 MR. HARRIS: I don't have any further
8 questions, thank you.

9 THE COURT: Any redirect?

10 REDIRECT EXAMINATION

11 BY MR. MATHIOWETZ:

12 Q. Mr. Hansen, counsel referred to the fact that you
13 had -- you've been involved in several reports between
14 the time you first got involved in this case and the
15 present. Would you agree that there have been some
16 substantial changes in the marketplace between the time
17 of your first report and the most recent report?

18 A. I would agree that the market has continued to
19 evolve and expand.

20 Q. Now, a lot of questions were asked regarding
21 overestimation of sales in Exhibit 106. In particular,
22 the over estimation of Bledsoe sales. Did that
23 overestimation of Bledsoe sales have any impact on your
24 market share analysis?

25 A. No, it did not.

1 Q. Why not?

2 A. As I testified to earlier, in preparing the
3 market share analysis, I removed the Bledsoe sales from
4 the market. So, to the extent those are overestimated
5 by Generation II, that would not impact the resulting
6 market share calculation. When I went to determine how
7 many of Bledsoe's sales have been met by Generation II,
8 I used the actual Bledsoe sales, not the estimate
9 provided by Generation II.

10 Q. So that 20 minutes or so of questioning about
11 Bledsoe's over-estimation of Bledsoe sales is
12 irrelevant; is that correct?

13 A. It doesn't affect the calculation of Generation
14 II's market share.

15 Q. Now, there was also reference to the fact that in
16 the very first report there was a claim for lost profits
17 in all sales. And, in your second report, in the second
18 report, you had alternatives of either lost profits or
19 market share analysis. When you go from lost profits on
20 all sales to a market share analysis, what effect does
21 that have on the overall damages?

22 A. That decreases the lost profits damages.

23 Q. So, in other words, the damage number comes down
24 rather than goes up; isn't that right?

25 A. That's correct.

1 Q. So it becomes a more conservative estimate rather
2 than what you had before?

3 A. It becomes a lower quantification of damages.

4 Q. You mentioned in your testimony earlier that you
5 relied on the Frost and Sullivan report for 2001. How
6 did the market share analysis done by Frost and Sullivan
7 compared with the market share analysis which had been
8 done by Generation II?

9 A. The market share analysis in Frost and Sullivan
10 was very similar to Generation II. There were a couple
11 of differences. In Frost and Sullivan, Generation II
12 was estimated to have a 45 percent market share. And
13 Bledsoe so was estimated to have just a 6 percent market
14 share. For the other major competitors, they were all
15 within 1 percent of the -- the Generation II's numbers
16 where within two percent of the Frost and Sullivan
17 numbers. So, in essence, Generation II, in their own
18 analysis, underestimated their market share and
19 overestimated the market share of Bledsoe.

20 Q. So Generation II underestimated their own market
21 share?

22 A. In comparison to Frost and Sullivan, the industry
23 report.

24 Q. Now there was also a question about difference,
25 differences in price between off-the-shelf and custom

1 braces. Does the reimbursement by an insurance company
2 result in making that somewhat of a meaningless
3 distinction in a lot of cases?

4 A. I'm not certain I understand your question.

5 Q. Well, so if whether there's reimbursement
6 involved by insurance companies, the difference between
7 -- in price between an off-the-shelf and a custom brace
8 dose not have as much significance, would you agree with
9 that?

10 A. I would agree with that. Generally, when you're
11 looking at the issue of price, it's the price that the
12 end user is going to pay. Since these are reimbursed
13 through an insurance, that's not a consideration for the
14 patient.

15 Q. Now, Bledsoe's counsel asked you why an orthotist
16 would fit a custom brace in lieu of a Bledsoe
17 off-the-shelf brace. Now, if that orthotist was
18 prescribing the Bledsoe brace because it had the
19 adjustability feature, what other options would he have
20 had, he or she have had, if the Bledsoe brace was no
21 longer available to them?

22 A. If that was the particular feature that caused
23 them to prescribe that brace or distribute that brace,
24 they would have had the Generation II braces and
25 potentially the Donjoy braces as available alternatives.

1 Q. So, the fact that it was in that circumstance,
2 whether or not it was custom versus off-the-shelf, is
3 not really the right distinction; is that correct?

4 A. That's correct.

5 MR. MATHIOWETZ: I have no further
6 questions.

7 MR. HARRIS: I have a couple of questions.

8 RE CROSS EXAMINATION

9 BY MR. HARRIS:

10 Q. In looking at the numbers, the only numbers we
11 had we knew were accurate were the Bledsoe numbers in
12 looking at the projection of the market allocation; is
13 that correct? I'm sorry, the Generation II and the
14 Bledsoe numbers were the only numbers we had; right?

15 A. Those were the only parties in this suit that
16 provided actual sales data.

17 Q. That had actual sales data in showing you the
18 Bledsoe numbers were grossly overstated. Does that call
19 into question the numbers for the other competitors as
20 well?

21 A. I think that the numbers for the other
22 competitors appeared reasonable.

23 Q. Appeared reasonable, but you don't know anything
24 about the market; correct?

25 A. I know about the market from my reading documents

1 and information in this case and discussions with
2 Generation II people and also reviewing deposition
3 transcripts.

4 Q. And you've indicated, I think in response to Mr.
5 Mathiowetz's question, that you'd used the Frost and
6 Sullivan report to verify these numbers when he did the
7 reports; is that right?

8 A. No.

9 Q. In fact, you didn't have the Frost and Sullivan
10 report even in 2003 after you'd already done three
11 reports; correct?

12 A. The Frost and Sullivan report was not available
13 to me at that point.

14 Q. So you didn't have it, and you didn't use it when
15 you put these numbers on these pages that you've shown
16 here to the jury; correct?

17 A. That's correct.

18 MR. HARRIS: Thank you.

19 THE COURT: All right. You may step down.

20 THE WITNESS: Thank you.

21 MR. BUNSOW: Plaintiff rests, Your Honor.

22 THE COURT: All right.

23 MR. HARDIN: Your Honor, we do have a motion
24 we would make at this time, if the Court would hear it.

25 THE COURT: Let's consider the motions have

1 been made, we'll deal with it later.

2 MR. HARDIN: Bledsoe Brace would call as its
3 first witness, Dr. Edward Grood.

4 EDWARD GROOD, being duly sworn, testified as
5 follows:

6 THE CLERK: State your full name and spell
7 your last name.

8 THE WITNESS: My name is Edward S. Grood,
9 that's spelled G-R-O-O-D, as in David.

10 DIRECT EXAMINATION

11 BY MR. HARDIN:

12 Q. Good morning, Dr. Grood.

13 A. Good morning.

14 Q. Would you please tell the jury a little bit about
15 yourself, where you went to undergraduate and graduate
16 school, and your present employment.

17 A. I have an undergraduate degree in physics from
18 Rensselaer Polytechnic Institute, and I went to graduate
19 school at the State University of New York at Buffalo
20 and got degrees in mechanical engineering. And I'm
21 currently Director of Undergraduate Studies for the
22 program for the Department of Biomedical Engineering at
23 the University of Cincinnati.

24 Q. How long have you been at the University of
25 Cincinnati, Doctor?

1 A. Since 1975.

2 Q. And between -- what was your Ph.D., when did you
3 receive that?

4 A. It was mechanical engineering with a dissertation
5 in bioengineering.

6 Q. And you had received that in what year?

7 A. 1972. Actually, '73, the degree was awarded.

8 Q. And, at that time, did that -- did any of your
9 doctoral studies include any biomechanics?

10 A. Just related to the heart.

11 Q. The heart.

12 A. Yes.

13 Q. Did there come a time in your career, Doctor,
14 that your studies turned towards biomechanics, in
15 particular joints and bones?

16 A. Yes, they did.

17 Q. When was that, sir?

18 A. That occurred around 1973/74. At the time I was
19 employed by the University of Dayton Research Institute.

20 Q. What did that institute do?

21 A. They did all kinds of research. Being in Dayton,
22 it's close to the Air Force. They did a lot of work for
23 Wright Patterson Air Force Base there, and I was part of
24 everything that they were doing to start work in the
25 medical area.

1 Q. Can you give us a taste of what that work in the
2 medical area was at Dayton.

3 A. It was very limited. It was, the work that I was
4 doing related to heart mechanics.

5 Q. And, after that position at Dayton, where did you
6 go next?

7 A. To the University of Cincinnati.

8 Q. And what was your position when you arrived at
9 the University of Cincinnati?

10 A. I was an assistant professor of research in the
11 Department of Orthopedic Surgery.

12 Q. So does the University of Cincinnati have a
13 teaching hospital?

14 A. Yes.

15 Q. And though bioengineering, you became -- began
16 working in a hospital environment?

17 A. Well, a medical school environment. And the
18 Department of Orthopedic Surgery where they train
19 residents in orthopedics.

20 Q. And, as an engineer then in medical school, what
21 kind of studies did you undertake?

22 A. My studies at the University of Cincinnati had
23 been almost exclusively related to ligament injuries,
24 diagnostics , how do you diagnose and how do you treat
25 ligament injuries of the knee joint.

1 Q. Beginning in what year?

2 A. The work would have begun in 1975.

3 Q. Can you just -- I'm going to give the jury some
4 more anatomy later, but just tell the jury now the
5 initial types of injuries or conditions that your
6 studies involved.

7 A. Some of the very early work had to do with what's
8 called an anterior cruciate ligament injury, I'm sure
9 you've heard of people who have had an ACL. And there
10 was a medical device that was being sold at the time as
11 a prosthetic for the anterior cruciate ligament, and we
12 were evaluating whether it was acceptable or not. And
13 ultimately testified to the FDA that it wasn't. And
14 ultimately the device got taken off the market.

15 Q. Now, when you were at the University of
16 Cincinnati in the research department, were you involved
17 in testing, gathering data, teaching? What were your
18 day-to-day job --

19 A. I was at the Department of Orthopedic Surgery at
20 the time.

21 Q. Thank you.

22 A. I was involved in doing research. Most of the
23 research involved studies on human joints. I was
24 involved in participating in clinical conferences where
25 cases would be presented by residents and the method of

1 treatment would be presented, and I would discuss the
2 biomechanical principles involved. I was involved in
3 post-graduate education courses that were for orthopedic
4 surgeons who had already graduated and were going to get
5 some additional training from particular topic areas.
6 So those are some of the things that I did.

7 Q. Did there come a point in your career when you
8 became involved with bracing?

9 A. Yes.

10 Q. When was the first time you became involved in
11 bracing in connection with your work at the University
12 of Cincinnati?

13 A. I became particularly interested in knee bracing
14 sometime in the 1980s. In the earlier to mid-1980s is
15 when I became interested and began to think about it and
16 figure out if there was something I might be able to do.

17 Q. And did some particular event trigger that for
18 you? Was there some reason that you decided that that
19 might be something to start investigating?

20 A. We had an agreement -- I say we, it was a group
21 of individuals with 3M of the development of prostheses
22 to replace the ACL, and we had formed a small company
23 for doing the R&D involved. And I was interested in
24 seeing that continue. And I knew the only way that I
25 could continue was if we had a product. So I began to

1 think about what products, and bracing looked
2 particularly appealing to me at that time.

3 Q. And did you follow through with that, did you do
4 something, did you follow up on your interest in bracing
5 at that time?

6 A. Yes. Somewhere in the mid-to later 1980s, more
7 mid, we started developing a knee brace. We worked on
8 that for quite a few years. And, ultimately, we formed
9 another company called Brace Technologies, and we
10 started selling braces I believe somewhere around 1990,
11 end, or maybe 1989.

12 Q. So the company actually came up with a brace
13 design --

14 A. Yes. I had a patent on a particular brace design
15 that was a unique design for the ante-cruciate ligament.
16 We had the components manufactured for us. We assembled
17 it. We had a network of distributors that were selling
18 the braces around the country.

19 Q. And you did get a patent on the brace?

20 A. Yes.

21 Q. And the brace again was for ACL use?

22 A. Could. Could also be used for post-cruciate with
23 some modifications.

24 Q. Can you tell the jury just generally how that
25 brace operated, just in general terms.

1 A. The brace had some unique features to it. One of
2 the features was that it was a very flexible brace. I
3 recognized that most braces that were being sold at the
4 time, all braces that I was aware of, were very rigid
5 cages, very strong and very rigid. And that a lot of
6 that rigidity was unnecessary, and, in fact, resulted in
7 abnormal forces being applied to the leg, which made
8 them uncomfortable. And also those abnormal forces
9 contributed to the braces moving on the leg. Keeping
10 the brace in one spot is always a problem. The leg is
11 conical, your thighs have a greater circumference than
12 your calf does. And so, if you put a brace on your leg
13 and it begins to slip down, it loosens further and can
14 slip down more ready. Also braces tend to rotate on the
15 leg. And, at least certain braces do, depending upon
16 what the forces are that are applied between the brace
17 and the leg. And so I designed a brace that was very
18 flexible, except where it needed to be rigid. And it
19 only needed to be rigid where it had to substitute for
20 the function of the ACL. And I did that, I accomplished
21 that by misaligning the hinge of the brace with the
22 normal axis of motion of the knee. The goal had been to
23 in large part to make the two axis align so that you
24 would wouldn't get any abnormal function, and I
25 intentionally misaligned them to produce the forces that

1 we wanted to get. And then I --

2 THE COURT: Let's stop at that point, we'll
3 pick up at 1 o'clock.

4 (Proceedings in Recess.)
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9 CERTIFICATE
10

11 I, Susan A. Zielie, Official Court Reporter, do
12 hereby certify that the foregoing transcript is correct.
13

14 /S/ SUSAN A. ZIELIE, RPR, CCR
15 _____
16 Susan A. Zielie, RPR, CCR
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